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THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

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1925.

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1930.

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1934.

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1937.

Debt Adjustment (*Alberta*) (*c.* 9), *as amended to c.* 42 *of* 1941. Attorney-General (Alberta) *v.* Attorney-General (Canada) **J. C. 356**

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Tobacco Tax (4 *Geo.* 6, *c.* 44), *of New Brunswick.* Atlantic Smoke Shops, Ld. *v.* Conlon **J. C. 550**

1941-1942.

Ontario : Abitibi Power and Paper Co., Ld. Moratorium. Abitibi Power and Paper Co. *v.* Montreal Trust Co. **J. C. 536**

ERRATUM.

Page 123, tenth line from bottom ; for " on " read " or."

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HIS MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

POTTS OR RIDDELL . . . . APPELLANT ;

AND

REID . . . . RESPONDENT.

H. L. (Sc.)*

1942

Apr. 30 ;
May 1, 4 ;
June 15.

Negligence—Building operations—Accident to workman—Machinery used for construction of building — "Area of building under "construction" — Working platform on scaffolding — Plank not conforming to Building Regulations, 1926 *— Misconduct of fellow-workman—Employer's liability—Building Regulations,* 1926 (*St. R. & O.* 1926, *No.* 738), *preamble, para.* 7*—Factories Act,* 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 67), *s.* 137, *sub-s.* 1.

By the preamble to the Building Regulations, 1926, it is provided that they shall "apply to all premises on which "machinery . . . . is temporarily used for the purpose of the "construction of a building," but that nothing in these regulations " . . . . shall apply to premises on which the only machinery " . . . . consists—(*a*) of machinery which is not used for "hoisting purposes and is outside the area of the building under "construction . . . ." By reg. 7 "every board or plank "forming part of a working platform" is required to have certain support, and not to project more than a specified distance beyond its end support.

**Present :* LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD PORTER.

H. L. (Sc.)
1942
Potts
or
Riddell
v.
Reid.

A workman employed on building operations on one of seven blocks of buildings under construction, while working on a scaffolding, stepped on a plank which had been placed on the working platform without authority by a fellow-workman in a manner not conforming to reg. 7, and in consequence fell, sustaining fatal injuries. A portable petrol-driven cement mixer, used to supply mortar for the construction of all the seven blocks of buildings, was at the time situated about twenty-three yards from the place where the workman was engaged. An action for damages in respect of his death was brought against his employer by his widow on her own behalf and on that of her children :—

Held, (1.) (Lord Macmillan dissenting) that the regulations were applicable, inasmuch as "the area of the building under construction" covered the area of the building operations as a whole and was not limited to the space within the walls of the building on which the man was working at the time of the accident ; (2.) that at the time of the accident the plank formed part of the working platform within the meaning of reg. 7 ; (3.) that reg. 7 imposed on the employer not merely an obligation in respect of the original construction of the platform but also an absolute and continuing duty as to its maintenance, and (4.) that the employer could not exempt himself from civil liability in damages for breach of reg. 7 by proving that he had used all diligence to enforce the execution of the regulation and that the commission of the offence was without his consent, connivance, or wilful default.

Semble, s. 137, sub-s. 1, of the Factories Act, 1937, which empowers the occupier or owner of a factory to exempt himself from liability for an offence under the Act by bringing the actual offender before the court, relates solely to criminal prosecutions and not to civil liability.

Decision of Court of Session, 1941 S. C. 277, reversed.

Appeal from the Court of Session.

The appellant, Mrs. Catherine Buchan Riddell (formerly Potts), brought an action in the sheriff court of Ayrshire on her own behalf and on that of her pupil children in respect of the death of her husband, Archibald Campbell Riddell, while in the employment of the respondent, George Reid. The sheriff substitute and, on appeal, the sheriff, decided the case against the appellant. The First Division of the Court of Session refused an appeal by the appellant.

The material facts of the interlocutor pronounced in the Court of Session on February 18, 1941, were as follows : "(1.) The pursuer (aged forty-three at the date of the proof) "is the widow of Archibald Campbell Riddell (hereinafter "called 'the workman') who resided in New Cumnock, "Ayrshire, and she sues in this action as an individual and

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"as tutrix and administratrix-at-law for their four children, "all pupils. (2.) On the morning of November 30, 1938, "the workman, a journeyman bricklayer, aged forty-eight, "was employed, with other workmen, by the defender (a "building contractor at Catrine, Ayrshire) in a housing scheme "at Cairn Road, Cumnock, Ayrshire. The scheme provided "for the erection of forty-eight houses [i.e., flats] in blocks of "four. Five blocks comprising twenty houses [i.e., flats] had "been completed and the pursuer and other of the defender's "workmen were working on the other blocks or some of them. "(3.) The scheme included blocks of four-flatted houses—two "on the ground floor and two on the upper. (4.) With other "labourers, the workman was, in the course of his employment "with the defender, laying the top wall of the upper storey "of one of the houses. For this purpose mortar was being "supplied from a portable petrol-driven cement mixer situated "near the end of a temporary road about twenty-three yards "from the house on which the workman was employed. "(5.) Before November 30, 1938, he, and his fellow-workers "had, while laying the top of that wall, been on a platform "of planks supported on trestles resting on joists between the "first and second storeys of the house. (6.) This platform "was approximately three feet three inches wide, consisting "of six planks, each fourteen feet long, six and a half inches "broad and two and a half inches thick, and as constructed "was safe. The projection of the planks beyond the trestles "was not more than ten inches. (7.) On the morning "mentioned, Capperauld (aged twenty), a fellow-labourer "with the workman, placed on the platform a seventh plank, "three inches thick, longer than the others and projecting "more than two feet beyond a trestle forming support of the "plank at one of its ends. This projection constituted a "danger to the deceased workman. (8.) In the course of his "employment, the workman stepped on the projecting portion "of the seventh plank. (9.) His weight was at least sixteen "stone. (10.) Under that weight the plank tilted, with the "results that he lost his balance, fell from the plank and "sustained injuries which proved fatal. (11.) There is no "evidence that the defender failed to provide adequate "material for safety of the platform. (12.) He had at the "place of employment a competent foreman, his brother "William Reid, aged forty-three, with over twenty-five years' "experience in the building trade. (13.) It is not proved "that the foreman instructed, approved of or acquiesced in the "addition of the seventh plank. He denies that he did and "Capperauld's testimony to the contrary is uncorroborated. "(14.) The workman had for a considerable period an average "weekly wage of 3*l.* 10s., on which the pursuer and their "children were wholly dependent. Find in fact and law: "(1.) that the workman's death was not caused by any fault "or negligence for which the defender is responsible; and "(2.) that, although a movable mechanical cement mixer, "situated, at the time of the accident, about twenty-three "yards from the workman, was used in connexion with his "work, the mixer was, on a sound interpretation of the "Building Regulations, 1926 to 1931, made in pursuance of "the Factory and Workshop Act, 1901, and any subsequent "statute relative thereto, 'outside the area of the building,' "and, therefore, the regulations have no application to the "present case and the defender has not been in breach of a "statutory duty."

The appellant appealed to the House of Lords.

Paull K.C. and *James Walker* (of the Scottish Bar) for the appellant. The Building Regulations, 1926, were properly made under s. 79 of the Factory and Workshop Act, 1901, and apply to this case since there is machinery (i.e., the cement mixer) within "the area of the building under construction," that is, the space occupied by the operation of erecting the building or buildings under construction. This space constitutes "premises on which machinery . . . . is temporarily "used" within the meaning of the words in the preamble to the regulations: see s. 105 of the Act of 1901 and ss. 60, 107 and 159 of the Factories Act, 1937. The word "premises" must take its colour from its context: *Whitley* v. *Stumbles* (1). Although the word "building" is used in the singular in the preamble to the regulations, it must be read as covering more than one building: Interpretation Act, 1889, s. 1, sub-s. 1 (*b*); *Conelly* v. *Steer* (2). [They also referred to *Pease* v. *W. J. Simms, Sons & Cooke, Ld.* (3).] The plank in question formed part of "a working platform" within the meaning of para. 7, which imposed an absolute obligation on the employer and must be so read in its natural meaning. The duty imposed is to keep the working platform, while in use, in such a condition that no plank projects beyond the prescribed limit. In this respect the effect of reg. 7 is similar to that of reg. 45 and s. 10 of the Factory and Workshop Act, 1901, the object of which is the same. It being established that this plank formed part of the working platform and that it contravened reg. 7, it is irrelevant that it was so placed without the consent or connivance of the employer. There is no provision corresponding to s. 102, sub-s. 8, of the Coal Mines Act, 1911, to relieve him from liability. [They referred to *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1) and *Black* v. *Fife Coal Co., Ld.* (2).]

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(1) [1930] A. C. 544.
(2) (1881) 7 Q. B. D. 520, 522.
(3) [1932] 1 K. B. 723, 731.

Blades K.C. (of the Scottish Bar) and *Montague Berryman* for the respondent. The regulations do not apply to this case. They constitute a self-contained code to be interpreted by reference to its own terms and language which lay down the conditions in which they are to apply, i.e., "to all premises on "which machinery . . . . is temporarily used for the purpose of "the construction of a building." They are not, however, to apply if the machinery is "outside the area of the building under "construction," as it is in this case. The latter phrase cannot have the same meaning as the word "premises," which must refer to a greater space, i.e., the part of the site devoted to the building of the remaining houses. The "area of the building "under construction" refers to the four walls of the building on which the man was engaged at the time of the accident. Since the machinery was outside these, the regulations do not apply. The Interpretation Act, 1889, has no application to them. Even if the regulations apply, the respondent was not in breach of his duty. On this point the findings of fact are in his favour. In the absence of reasonable opportunity, there was no duty on him to guard against unauthorized interference by a third party with the working platform. His duty does not import a day to day or an hour to hour inspection: *Groves* v. *Wimborne (Lord)* (3). By reg. 7 the respondent was placed under a duty of erecting a safe platform. If he establishes that he has used all due diligence and that the breach was committed by some other person he is absolved. [They referred to *Northwestern Utilities, Ld.* v. *London Guarantee and Accident Co., Ld.* (4), *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (5) and *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (6).] The respondent satisfied all his obligations

(1) [1934] A. C. 1.
(2) [1912] A. C. 149.
(3) [1898] 2 Q. B. 402, 418.
(4) [1936] A. C. 108.
(5) [1940] A. C. 152, 164, 171.
(6) [1934] A. C. 1, 13.

by putting up a safe working platform which at the beginning complied with reg. 7 in all respects and he was not responsible for the unauthorized act of the person who added the offending plank in breach of reg. 50, which provides: "No person "employed shall interfere with . . . . any of the plant or "safeguards required by these regulations without the authority "of the employer or his responsible foreman." See also s. 119 of the Factories Act, 1937. In any event, this plank never formed part of the "working platform." Further, the effect of ss. 130, 136 and 137 of the Factories Act, 1937, is to exonerate the respondent from civil liability.

Paull K.C. replied.

The House took time for consideration.

1942. June 15. Lord Thankerton. My Lords, this appeal arises in an action of reparation brought by the appellant on her own behalf and on behalf of her pupil children in respect of the death of her husband while in the employment of the respondent as a journeyman bricklayer. The action is based on fault of the respondent in respect of breach of duty to his workman. It was originally based on breach of common law duty and also on breach of a statutory duty laid on the respondent by the Building Regulations, 1926, but, in this appeal, the breach of statutory duty is alone maintained as the ground of fault. This action having originated in the Sheriff Court, the interlocutor of the First Division of the Court of Session, against which this appeal is taken, in accordance with s. 40 of the Court of Session Act, 1825, specifies the several facts material to the case which they find to be established by the proof, and expresses how far their judgment proceeds on the matter of fact so found or on matter of law, and the several points of law which they mean to decide, and appeal is only open in this House so far as the interlocutor depends on or is affected by matter of law, but, so far as it relates to the facts, the interlocutor has the force and effect of the special verdict of a jury, finally and conclusively fixing the several facts specified in the interlocutor.

The questions in issue may be stated as follows: (1.) Do the Building Regulations, 1926, apply in the present case? (2.) If so, did the seventh plank form part of the working platform at the time of the accident within the meaning of reg. 7 of the regulations ? (3.) If both these questions are answered affirmatively, was there a breach of statutory duty on the part of the respondent such as to constitute fault or negligence on his part ? A negative answer to any one of these questions will lead to failure of the appeal.

First, as to the applicability of the Building Regulations which are made under the authority of s. 79 of the Factory and Workshop Act, 1901, which provides as follows : "Where the "Secretary of State is satisfied that any manufacture, "machinery, plant, process or description of manual labour, "used in factories or workshops, is dangerous or injurious to "health or dangerous to life or limb, either generally or in the "case of women, children or any other class of persons, he may "certify that manufacture, machinery, plant, process or description of manual labour to be dangerous ; and thereupon the "Secretary of State may, subject to the provisions of this Act, "make such regulations as appear to him to be reasonably "practicable and to meet the necessity of the case." The power to make such regulations for buildings is conferred by s. 105, sub-s. 1, of the Act, which provides that the provisions of the Act with respect to, inter alia, regulations for dangerous trades "shall have effect as if any premises on which machinery "worked by steam, water or other mechanical power is "temporarily used for the purpose of the construction of a "building or any structural work in connexion with a building "were included in the word 'factory,' and the purpose for "which the machinery is used were a manufacturing process, "and as if the person who, by himself, his agents or workmen, "temporarily uses any such machinery for the before-mentioned "purpose were the occupier of the said premises ; and for the "purpose of the enforcement of those provisions the person so "using any such machinery shall be deemed to be the occupier "of a factory." By certificate dated October 6, 1921, the then Secretary of State, in pursuance of s. 79, certified as dangerous "the construction of a building and any structural work in "connexion with a building, for the purpose of which "machinery worked by steam, water or other mechanical "power is temporarily used," and, on June 21, 1926, the then Secretary of State made the Building Regulations, 1926, which are here under construction, and which begin by providing as follows : "In pursuance of s. 79 of the Factory and Workshop "Act, 1901, I hereby make the following regulations and "direct that they shall apply to all premises on which machinery

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"worked by steam, water or other mechanical power is temporarily used for the purpose of the construction of a building "or for the purpose of any addition to the structure of an "existing building. Provided that nothing in these regulations "except para. 45 shall apply to premises on which the only "machinery worked by steam, water or other mechanical "power consists—(*a*) of machinery which is not used for "hoisting purposes and is outside the area of the building under "construction, or (*b*) of portable tools such as drills or rivetters." The question of the applicability of these regulations depends on the proper construction of the words "the area of the building "under construction" in the proviso (*a*). If the cement mixer, which was not used for hoisting, was outside that area, the regulations, except reg. 45, do not apply. The majority of the learned judges of the First Division took the view that these words could only refer to the area bounded by the four walls of a block which was being built and could not include anything beyond the ground plan of the building itself.

My Lords, I find difficulty in accepting such a narrow construction of these words if an alternative construction is reasonably available, for I cannot think that any Secretary of State would consider that such a limited application of the regulations would "meet the necessity of the case" in regard to that which he had certified as dangerous. To take an illustration, an outside scaffolding would be covered by the regulations if the non-hoisting machinery were inside the ground plan, but it would not be covered if the machinery were in among the supports of the scaffolding. I am satisfied that there is an alternative construction available, which will afford more reasonable protection to those employed in this dangerous work. In the first place, I am of opinion that the singular words ought to be read as inclusive of the plural. The Interpretation Act, 1889, would clearly apply that construction to s. 105, sub-s. 1, of the Act, and I am of opinion that, in using the language of s. 105, sub-s. 1, in the opening paragraph of the regulations the Secretary of State must be taken to have intended—although the Interpretation Act does not apply to the regulations—a construction identical with the statutory construction. In the second place, I think that the learned judges have not correctly appreciated the relation between the use of the words "premises" and "area," for, in my opinion, the area of the building under construction is not necessarily less than the premises on which the machinery is temporarily used.

They might very well be identical, or the premises on which the machinery is used might be entirely separate and detached from the area of the building under construction. Lastly, a perusal of the regulations makes clear that they were intended to protect workmen equally whether they were working on the outside of the four walls or inside, and the limitation of proviso (*a*) is made by the Secretary of State and not by the statute. Clearly, the object of the regulations is to protect workmen who are engaged in building operations which are associated with the temporary use of machinery, or—to use the language of s. 105, sub-s. 1, of the Act, as construed by the Interpretation Act—where machinery is temporarily used for the purpose of construction of a building or buildings or any structural work in connexion with a building or buildings. I find it possible to regard the words "the area of the building "under construction" as referring to the building operation rather than to the material object which emerges as the result of the building operation, and, for the reasons already indicated, I prefer that construction to the narrow and unprofitable view taken by the majority of the First Division. I am inclined to think that Lord Carmont was in sympathy with this view, but, apart from a reservation in the opinion of Humphreys J., I do not find that it conflicts with the decision of the King's Bench Division in *Pease* v. *W. J. Simms, Sons & Cooke, Ld.* (1), where there was a finding that the machinery was no longer being temporarily used for either of the two buildings on which the two accidents occurred, one of which was a completed house and the other house was nearly completed. I agree with the view expressed by all the learned judges in the present case that that part of the original building scheme site on which the groups of houses have been completed no longer forms part of the premises on which the machinery is temporarily used. This view is in line with the English decision, which had nothing to do with the Building Regulations. It was not disputed that, as stated by Lord Fleming, the cement mixer was situated within the ground on which there were houses under construction, and, in my opinion, that ground constituted the premises on which the machinery was being used, but I am further of opinion that you are not entitled to split up these building operations into separate units and split up the utilization of the machinery accordingly. The scheme, so far as uncompleted, was still one building scheme, and the building

(1) [1932] 1 K. B. 723, 731.

operations still fall to be regarded as a whole, and the cement mixer was within the area of those building operations. I, therefore, hold that the regulations do apply in the present case.

As regards the second question, reg. 7 of the regulations provides: "Every board or plank forming part of a working "platform or run shall be supported at proper distances and "near each end by a putlog or other support, and no such "board or plank shall project beyond its end support to a "distance exceeding four times the thickness of the board or "plank." The respondent maintained that this paragraph only applied to the initial provision of the platform by the employer, and its erection prior to its use by the workmen. I am clearly of opinion that that contention is unsound and that the obligation was a continuing one, prescribed for the continuous safety of the workmen while at work. I have equally little doubt, in view of the findings in fact, that the seventh plank did form part of the working platform which was being used by the workmen at the time of the accident for the purpose of their work. It follows that the working platform, at the time of the accident, was not in conformity with the provisions of reg. 7.

It remains to consider the third and last question, namely, whether the disconformity of the working platform to the provisions of reg. 7 of the regulations involves the respondent in such a breach of statutory duty towards the deceased as will render him liable to the appellant on the ground of culpa.

My Lords, I have no doubt that reg. 7, which is found in part I. of the regulations, which prescribes the duties of employers, was imposed for the protection of those employed by them and is in pari casu with the statutory obligation which was the subject of the decision of this House in *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1), where Lord Warrington conveniently summarized the law as follows: "I think the "following propositions are supported by authority:—(1.) If "the obligation is to do or abstain from doing a particular "thing, and on the construction of the statute the obligation "is created for the protection of a particular class, e.g., workers "in a mine or factory, then a member of that class injured by "the non-performance of the obligation is entitled to sue the "owner in an ordinary action founded on personal negligence. "(2.) The fact that the obligation has not been performed is in "itself evidence of personal negligence on the part of the

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(1) [1934] A. C. 1, 13.

"owner. (3.) The owner cannot relieve himself of his obligation by saying that he has appointed reasonably competent "persons and that the breach is due to negligence on their "part, nor was it open to him at common law to plead "common employment. (4.) There appears to be no material "difference in this respect between the law of England and "that of Scotland." In my opinion, these considerations equally apply in the present case. The respondent, however, maintained that the statutory provisions which afford grounds on which he would be held not to have committed an offence or not to be liable to conviction of an offence equally provided grounds which would be a good defence to the present civil action. In this matter, the relevant statute is the Factories Act, 1937, and the relevant sections are ss. 130, 136 and 137, which are in part XII. of the Act relating to "Offences, Penalties "and Legal Proceedings," as modified for Scotland by s. 156. In my opinion, these sections, which solely relate to criminal prosecutions and contain no reference to civil liability, do not affect the existence of a contravention of the Act or regulations or the law applied in *M'Mullan's* case (1). In my opinion, it would need some provision in the Act as to civil liability to relieve the employer of his absolute obligation towards the workman. Such a provision is to be found in s. 102, sub-s. 8, of the Coal Mines Act, 1911, and reference may be made to *Coltness Iron Co., Ld.* v. *Sharp* (2). There is no such provision in the Factories Act, 1937. In considering the cases on this question, it is important to observe the distinction between an obligation to provide and maintain adequate and safe plant and the obligation to ensure safe working of the plant so supplied. The distinction is well illustrated by *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (3), in which it was held that s. 16, sub-s. 1, of the Coal Mines Regulation Act, 1887, imposed an absolute obligation on the mineowner to provide proper apparatus for lowering persons employed at the mine, to the allegation of breach of which it was no answer that the colliery company had not been personally negligent and that the plaintiff was entitled to judgment on that ground, and that questions of contravention of the general rules under ss. 49 and 50 of the Act did not affect the question; see per Viscount Haldane L.C. (4). Under *M'Mullan's* case (1) the correct statement of the position is that the employees' negligence constitutes in

(1) [1934] A. C. 1, 13.
(2) [1938] A. C. 90.
(3) [1912] A. C. 693.
(4) Ibid. 702.

such a case personal negligence of the owner. On the other hand, the obligation to secure safe working of the plant supplied is well illustrated by *Black* v. *Fife Coal Co., Ld.* (1), in which it was held that the owners were in breach of their statutory duty under s. 49 of the Act of 1887 to take all practicable steps to secure observance of the statutory rules as they had failed to secure that the persons in charge of the mine were competent to deal with the dangers arising from the presence of poisonous gas. Lord Kinnear says (2): "The main ground on "which the judgment on this point was impugned by the "appellants' counsel was that the statute imposes the duties, "which are found to have been neglected, absolutely and "directly upon the mineowners; and, therefore, that they have "a good ground of action independently of negligence. I "agree that if an absolute duty is imposed upon mineowners "by statute they must be liable absolutely to those for whose "benefit it is imposed; and that if the things so required to be "done are not done, it will be no answer to say that the failure "is not owing to any fault or omission of theirs. That such an "absolute duty may be imposed by statute I have no doubt "whatever, and probably there may be some such duties "imposed upon mineowners by the statute in question. But "I find no such absolute duty in the statute with reference to "the two rules which are said to have been infringed. The "table of rules in which they occur is introduced by the general "enactment that the following general rules are to be observed, "not absolutely and in any event, but 'so far as reasonably "'practicable in every mine.' Nor are the two rules in "dispute addressed directly to the mineowners."

I am, therefore, of opinion that the respondent is liable to the appellant for the consequences of his personal negligence, established by the breach of the absolute obligation imposed on him by reg. 7 of the regulations, and the parties expressed themselves as content with the opinion of the learned Lord President that an award of 750*l.* to the mother and of 250*l.* to each of the four pupil children would be an appropriate assessment of the damages. I move, therefore, that the appeal be allowed, that the interlocutor of the First Division of the Court of Session dated February 18, 1941, so far as appealed against, be set aside, and that the cause be remitted to the Court of Session to decern in favour of the pursuer for the respective sums of damages indicated

(1) [1912] A. C. 149.

(2) [1912] A. C. 149, 159, 160.

above, the pursuer to have her expenses of the action in the sheriff court and in the Court of Session and her costs in this appeal.

Lord Russell of Killowen (read by Lord Thankerton). My Lords, there are three questions to be determined in this case. (1.) Do the regulations apply? (2.) If they do apply, did the respondent commit a breach of them? (3.) If he did, is he liable to the appellant in damages? The First Division (Lord Carmont dissenting) held that the regulations had no application to the case on the ground that the cement mixer, not being within the four walls (or the ground plan) of the building on a wall of which the deceased was at work, was "outside the area of the building under construction." If this view is right the appeal must fail, and I, therefore, proceed to consider the first of the three questions.

The regulations were made by the Secretary of State under the Factory and Workshop Act, 1901, by virtue of the powers conferred by s. 79 of that Act. Under that section (which is headed "Regulations for Dangerous Trades") the Secretary of State (I omit irrelevant words) if "satisfied that any "machinery . . . . or description of manual labour, used in "factories or workshops, is dangerous to life or limb . . . . "may certify that . . . . machinery . . . . or description of "manual labour to be dangerous; and thereupon . . . . may "make such regulations as appear to him to be reasonably "practicable and to meet the necessity of the case." That power is in that section limited to factories and workshops, and a building under construction is neither, but s. 105 provides that (among other provisions of the Act) the provisions with respect to regulations for dangerous trades—I now quote the words:—"shall have effect as if any premises on which "machinery worked by steam, water or other mechanical "power is temporarily used for the purpose of the construction "of a building or any structural work in connexion with a "building were included in the word 'factory' . . . ." It is to be noted that s. 105 does not make a building under construction a factory. What it does is to enable the Secretary of State (after the requisite certificate) to make "such regulations as appear to him to be reasonably practicable and to "meet the necessity of the case" which will be applicable to any premises on which machinery worked by mechanical power is temporarily used for the purpose of the construction of a building. At this point the following observations occur to me. In the first place, the word "premises" is a wide term. It would be within the power of the Secretary of State to make his regulations apply to cases where the machinery was used anywhere on the area of the building operations, even though outside the ground plan of a building under construction. In the next place, the regulations may cover all kinds of matters for the protection of workmen. They need not be confined to protecting against risks incidental to the use of machinery. In other words, the temporary user on premises of power machinery for the purpose of the construction of a building enables the Secretary of State to make regulations protecting the workmen from all or any of the risks incidental to their trade. Finally, the reference in s. 105 to a "building" includes, by virtue of the Interpretation Act, 1889, the cases where more than one building is under construction.

But the crucial question is whether the regulations have no application to the present case (as the First Division has held) because the machinery was not placed inside the limits of the ground plan of the building on which the deceased was at work. The answer to that question depends upon the true construction of what may be called the preamble to the regulations. The requisite certificate was signed by the Secretary of State on October 6, 1921. It certified that the construction of buildings for the purpose of which power machinery was used was dangerous, i.e., that the manual labour used was dangerous. The regulations here in question were dated June 21, 1926. It should, however, be stated that although the Act of 1901 was wholly repealed by the Act of 1937 the existing regulations were saved. They constitute, I think, a self-contained document which must be construed in accordance with the language used therein without reference to the language of either statute. They start off with what I have called a preamble in the words following: "In pursuance of s. 79 of "the Factory and Workshop Act, 1901, I hereby make the "following regulations and direct that they shall apply to all "premises on which machinery worked by steam, water or "other mechanical power is temporarily used for the purpose "of the construction of a building, or for the purpose of any "addition to the structure of an existing building." So far the words of s. 105 have been strictly followed, but then comes this proviso: "Provided that nothing in these regulations "except para. 45 shall apply to premises on which the only

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"machinery worked by steam, water or other mechanical "power consists—(*a*) of machinery which is not used for "hoisting purposes and is outside the area of the building "under construction, or (*b*) of portable tools, such as drills or "rivetters."

The crucial question may now be posed in terms of the present case. Was the cement mixer "outside the area of "the building under construction" within the meaning of the proviso? Although the word "building" is used in the preamble and proviso in the singular, there cannot, I think, be any doubt that (as was pointed out by some of the judges of the First Division) the word must cover and include more than one building. The regulations are made under a power which would enable the Secretary of State to cover the case where more than a single building is being built, and it is inconceivable to attribute to him an intention of protecting the workmen in the one case but to leave them unprotected in the other. In the present case there was a scheme for the erection of a group of buildings consisting of twelve blocks on a site at Cumnock. A portable petrol-driven cement mixer was used for the purpose of the construction of the buildings. Seven blocks were still in course of construction. On one of them the deceased was employed, using mortar supplied from the mixer which was only twenty-three yards distant from his work. Why is that mixer not within the area of the building or buildings under construction? The buildings for the construction of which the mixer was being used were the seven blocks. They were the buildings under construction. If the strict literal construction adopted by the First Division is correct, no workman was protected by the regulations, for the mixer was apparently not inside any building or ground plan. It was "near the end of a temporary "road." If the strict literal construction be correct, it produces the extraordinary and, to my mind, inconceivable result that if the relevant machinery is on one side of a wall or plan line the workmen are protected by the regulations, but if on the other they are not, a result all the more extraordinary when one realizes that many of the regulations (reg. 21 is one example) afford protection from risks wholly unconnected with the presence of machinery placed within the walls of a building or the area of its ground plan. Further, why is the only building to be considered the one at which the accident occurred? The mixer was apparently the only relevant machinery on the premises. It could not be within all the buildings or the ground plans of all the buildings under construction, with the result, if the strict literal construction is adopted, that only those workmen are protected by the regulations who are working on the one building within whose ground plan the mixer may happen for the time being to stand.

My Lords, unless there is no possible escape from it, I decline to attribute so illogical and inexplicable an intention to the Secretary of State, and such a disregard for the safety of the building workmen. I feel, however, able to suggest a reading of the proviso which will accord with what I think must have been the object of the regulations, namely, the protection of workmen engaged in building operations. When buildings are erected, the activities which constitute the building operations extend beyond the area eventually occupied by bricks and mortar. We are all familiar with the temporary sheds, the stacks of scaffold material, and other building accessories placed on building sites. I see no reason why in the proviso the words "outside the area of the building "under construction" should not bear the wider meaning of a reference to the area or space occupied by the operation of building the building or buildings under construction. So read, the proviso would operate as one would expect it to operate, namely, as a proviso that the regulations would have no application to premises which did not comply with the requirements of s. 105, and as to which the Secretary of State had no power to make regulations under s. 79, cases for instances in which the premises on which the relevant machinery is being used is so far distant that the land on which it stands cannot be said to form part of the area on which the building operations are carried on. Each case would depend on its own facts, but I see no difficulty in holding in the case before us that the site of this mixer formed part of the area on which was being carried on the operation of constructing the seven blocks, including the building on which the deceased was at work. If the "area" mentioned in the proviso must necessarily be a space smaller than the "premises" mentioned in the proviso, that requirement can be met by assigning the word "premises" to the area of the operations of the whole building scheme, notwithstanding that as to five blocks the bricklaying had all been finished, and by assigning the word "area" to the area of the operation of constructing the other seven blocks as to which the bricklaying was still in progress. In this I agree with Lord Carmont. My Lords, for these reasons I am prepared to depart from the strict literal construction of the words "outside the area of the building under construction," and to hold that the regulations did apply in the present case.

What, then is the answer to the second question? It was argued that there was no breach by the respondent because he had fulfilled his obligation by providing a working platform which at its initiation complied with the regulations in all respects, and that he was not responsible if someone without proved authority (and indeed in violation of reg. 50) added an offending plank. But, in my opinion, the obligation was not merely an obligation to provide a proper working platform. The relevant regulation is in reg. 7 which requires that no board or plank forming part of a working platform "shall "project beyond its end support to a distance exceeding four "times the thickness of the board or plank." That requirement is not confined to the time when the working platform is provided. The regulation means that at no time while a working platform is in use shall a plank forming part of it project beyond the specified limit. That is, in my opinion, an absolute and continuing obligation binding the employer which is broken if at any time a workman is at work on a platform of which an offending plank forms part. In the present case the deceased, when he met with the accident which killed him, was at work on such a platform. There was, therefore, in my opinion, a breach of reg. 7. I do not feel able to adopt Lord Carmont's view that the offending plank did not form part of the working platform. Unfortunately, it formed part of the platform on which the deceased was working and was the cause of his death. It was part of the working platform de facto, even though the person who placed it there had no authority to do so.

There remains the question whether the respondent is liable to the appellant in damages. This claim to damages is based on the alleged negligence of the respondent, and the negligence is proved by the breach of the regulation: see *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1) and the four propositions stated by Lord Warrington. Nor is it any answer for the employer to say that the breach is not owing to any fault or omission of his: see *Black* v. *Fife Coal Co., Ld.* (2). The cause of action is, therefore, complete and the

(1) [1934] A. C. 1. (2) [1912] A. C. 149.

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appellant is entitled to recover the damages which, as the parties now agree, should be fixed at the sums suggested by the Lord President. It was argued that in some way the result of ss. 130, 136 and 137 of the Factory and Workshop Act, 1937, was to exonerate the respondent from civil liability. That under or by virtue of these sections criminal liability may, no doubt, be avoided is possible, but I can find nothing in them to absolve from civil liability to pay damages. It may be noted, however, that s. 137, sub-s. 1, does not apply to Scotland: see s. 156, sub-s. 17. I would allow the appeal.

LORD MACMILLAN. My Lords, in this appeal the appellant's case, as maintained at your Lordships' bar, was that her husband was fatally injured in consequence of the respondent's breach of his statutory duty under reg. 7 of the Building Regulations, 1926, made by the Secretary of State in pursuance of the now repealed Factory and Workshop Act, 1901, and continued in force by s. 159 of the Factories Act, 1937. The respondent pleaded that the regulations did not apply to the premises on which the accident to the deceased occurred. The regulations are directed to apply to "all premises on which "machinery worked by steam, water or other mechanical "power is temporarily used for the purpose of the construction "of a building," but it is provided that, with one exception, they are to be inapplicable to "premises on which the only "machinery worked by steam, water or other mechanical "power consists (*a*) of machinery which is not used for hoisting "purposes and is outside the area of the building under "construction. . . . ." The deceased workman at the time when he met with the fatal accident was employed as a bricklayer by the respondent in the construction of a two-storied building of four flatted houses. The building was being erected at Cumnock in Ayrshire in pursuance of a housing scheme for the construction of a large number of similar houses, some of which at the time of the accident had already been completed, while others were still in process of erection. The only machinery in use in connexion with the work was a portable petrol-driven cement mixer, which was situated near the end of a temporary road about twenty-three yards from the building on which the deceased was working. The cement mixer was, of course, not used for hoisting purposes and the crucial question is whether it was "outside the area "of the building under construction."

Having given repeated consideration to the problem, I find myself in agreement with all the courts below that the cement mixer was outside that area. I agree with the Lord President that the expression "the area of the building under construction" cannot be "construed to include anything beyond "the ground plan of the building itself." The words are unequivocal. I read the words "the area of the building" as meaning the area occupied or to be occupied by the building. If the words had been "the area on which the building is "being constructed" there might have been room for a wider reading of the word "area," but the expression being the "area of the building," I cannot see how it can be taken to include not merely the area occupied by the building, but also an indefinite extent of ground vaguely described as the building site. The Building Regulations are rigorous and exacting and their contravention is attended with serious penalties. It would, in my view, be unfortunate if the question of their application in a particular case were left to depend on a quite indefinite test. It has been suggested that to limit the words to what I regard as their plain meaning would be unreasonable, for then the builder would only have to see that his cement mixer or other machinery was placed just outside the four walls of the intended building in order to be free of the regulations, but is this any more arbitrary than for him similarly to free himself from the regulations by placing his cement mixer just outside the limits of the building site, whatever that may mean? After all, "the "area of the building under construction" must have some limits, and it will always be possible to place the machinery just outside those limits however they may be defined, with the result that the regulations will not apply. The test may seem an arbitrary one, but it remains arbitrary whatever the area of the building may be held to include.

But is the reading which approves itself to me so arbitrary? For the application of the regulations the presence of machinery has been selected as the criterion, presumably because it is this which renders the premises dangerous and so a proper subject for regulation. The employment of machinery within the structure under erection may materially add to the dangers of the work and justify the requirement of precautions which would be unnecessary if the machinery were placed outside the structure on which the employees were working. To my mind, it seems arbitrary in the extreme that the mere presence and use of this cement mixer twenty-three yards away from the building on which the deceased was working, which was in no way a source of danger to him when at his work, and was in no way connected with the accident to him, should have the result of imposing on his employer the whole stringent code of regulations designed for premises on which machinery is used for building construction. There are other considerations derived from the terms of the statute of 1901, and particularly ss. 105 and 149, which confirm me in my view, but as I am alone among your Lordships in entertaining it I shall not take up further time by elaborating them. I should, accordingly, be in favour of dismissing the appeal on the ground that the regulations do not apply. I would only add an expression of my regret that in a matter where precision is so eminently desirable the regulations should have been framed in terms which have occasioned such divergence of interpretation here and in Scotland among judicial minds desirous only of ascertaining and giving effect to the meaning and intention of the statute and of the Secretary of State.

Assuming, contrary to my opinion, that the regulations apply, I agree with your Lordships that on the facts found there has been a breach by the respondent of the duty imposed by reg. 7, which I regard as a continuing duty. I need not repeat the considerations which have moved my noble and learned friends who have preceded me, and who will follow me, to hold in favour of the appellant on this branch of the case. It will suffice to say that I agree with them. There having been a breach of an absolute duty incumbent on the respondent personally for the protection of his employees, he must, in my opinion, be held to be in fault and to be liable in reparation for the accident which was the direct consequence of that breach.

LORD WRIGHT. My Lords, the only claim now pursued by the appellant is that for breach of the duty implied in or evolved from the statutory provisions for the protection of the worker, she having abandoned her alternative claim for negligence at common law. The statutory duty founded on is that set out in the Building Regulations, 1926. These regulations were made under s. 105 of the Factory and Workshop Act, 1901. That Act was repealed by the Factories Act, 1937, s. 159, but under that section the regulations in question continue in force and are deemed to have been made under the provisions of that Act, in particular ss. 60 and 107, which replace the corresponding sections of the earlier Act.

The main question is whether the conditions which the Secretary of State has specified in the preamble to the regulations as necessary for their application in any particular case have been satisfied in the case of the building operations in question. The Court of Session (Lord Carmont dissenting on this point) have held that the regulations on their true interpretation did not apply to the building on the construction of which the deceased man was employed at the time of the accident. The breach complained of was that reg. 7 of the regulations was not complied with. This requires that every board or plank forming part of a working platform shall be supported at proper distances and near each end by a putlog or other support, and no such board or plank shall project beyond its end support to a distance exceeding four times the thickness of the board or plank. On the morning of the accident this provision, which up to then had been observed, had been broken, because a fellow-worker had added an additional plank to the platform, and that plank projected beyond the end support to a greater distance than the permitted maximum, so that when the deceased man stepped on it, it tipped up and threw him to the ground with fatal consequences. I disregard for the moment some further questions which were raised in debate, and turn to the facts relevant to the application of the regulations. The building operations were in connexion with a scheme for the construction of forty-eight flatted houses in blocks of four. Of the twelve blocks, five had been completed at the time of the accident. The deceased man, when he fell, was, in the course of his employment, laying the top of the wall of the upper storey of one of the houses. For this purpose mortar was being supplied from a petrol-driven cement mixer situate near the end of a temporary road about twenty-three yards from the house on which the workman was employed. I quote from the findings of the Court of Session. The court also finds that the cement mixer was "outside the area of the building" within the meaning of the regulations. This involves a matter of law, namely, the construction of the regulations which by their terms are to apply to "all premises on which machinery worked by "steam, water or other mechanical power is temporarily used "for the purpose of the construction of a building, or for the "purpose of any addition to the structure of an existing "building." But there is a proviso that (with an exception not here material) the regulations are not to apply to premises on which the only machinery of the type specified is not used for hoisting purposes and is outside the area of the building. The words which are relevant in this case are "outside the area "of the building under construction." These words have to be interpreted along with the earlier words, "premises on which "machinery . . . . is temporarily used for the purpose of the "construction of a building" or of additions to a building. It is said that "premises, etc." must denote a larger space than the area of the building under construction, because it is clearly contemplated that the machinery may be on the premises and yet be outside the area of the building. That may be so, but it does not, I think, justify the conclusion which is drawn by the respondent that the "area" must be limited to the space included in the four walls. This would produce a paradoxical result. It would mean that the cement mixer would need to be placed within the wall plan of the building, which would be physically impossible if what was being built was a wall, practically impossible where several buildings were being erected, and generally inconvenient and unworkable. I think that the words do not fairly involve this interpretation. The "area" meant is a larger space than that. The singular "building" in this connexion must, in my opinion, include the plural and include the buildings on which work is being done, though no doubt the completed buildings are to be put out of question, as a Divisional Court held in *Pease* v. *W. J. Simms, Sons & Cooke, Ld.* (1), because they are not under construction. Whether the Interpretation Act, 1889, s. 1, sub-s. 1, does or does not apply to a statutory rule or order made under an Act, equally as to the Act itself, as I think it does, I am of opinion that the common law rule of interpretation laid down in *Conelly* v. *Steer* (2) by Lord Selborne L.C. that in construing a statute plural is to be read as singular whenever the nature of the subject-matter requires, applies to regulations like these, so that the statute and the regulations are construed on the same principles (any other view would be paradoxical). If so, the same rule applies in the converse sense that the singular includes the plural. Thus, in the present case the "area" is the area of the buildings under construction, that is, the "area" of the seven uncompleted

(1) [1932] 1 K. B. 723.

(2) 7 Q. B. D. 520, 522.

blocks so far as under construction. Even if that were not so, the "area of the building under construction" must include not merely the piece of ground to be covered or enclosed, but all the adjacent ground which is used by the builders in the operation of construction, namely, for stacking bricks or other materials and for ancillary operations and for tool sheds and so forth. This seems to me to be in any event the natural meaning in the context of the words. This area would naturally be larger, the larger the building or building scheme. The cement mixer would be normally sited in a place as convenient as possible for the building or buildings. In the facts of the present case I see no ground for holding that the area so understood did not include both the position in which the cement mixer was placed and the temporary road connecting it with the particular house on which the deceased was working. That, I think, is true whether the particular house is artificially isolated from the rest of the scheme or whether the seven houses still under construction are all taken into consideration. I agree with Lord Carmont that "when one is dealing with a group of buildings the point "to be considered is whether the machinery lies outside the "area on which buildings are still in course of erection."

In my judgment, the objection that the regulations did not apply, because the machinery was outside the area, fails. I do not, however, exclude the possibility that in other and different circumstances the position of the machinery might be so distant and distinct from the building operations as to make it independent practically and to place it outside their area. That might be a question of fact and degree. In my judgment, the regulations apply in this case.

I can deal shortly with the remaining objections taken against the appellant's claim. Lord Carmont was troubled by the difficulty which he felt of holding that the plank which caused the accident formed part of the working platform. I cannot, however, see how it can be here otherwise regarded. "A working platform" is not a technical term. It means the platform of planks provided for the man to work on, on which he did work. Such was the platform from which the deceased fell. The substantial objection sought to be taken is, however, really different, and is based on the fact that up to the morning of the accident the platform had satisfied the requirements of reg. 7 of the regulations, but sometime on that morning a fellow-workman, Capperauld, aged twenty, had placed an additional plank on the platform, which infringed the regulations and constituted a danger to the deceased workman. It was, indeed, a trap. It is found that he stepped on the projecting portion of this plank "in the course of his "employment," which tilted up so that he fell. There is no finding whether the foreman instructed or approved the addition of the plank. It is stated in the record that he denies that he did, but his evidence and Capperauld's testimony to the contrary are uncorroborated. It has been established by a series of decisions of this House that the employer's obligation to comply with statutory provisions for the safety of his employees is generally absolute. It is superfluous now to review these decisions. I need only cite two authorities out of several: *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (1), on appeal from Scotland, and *Smith* v. *Cammell Laird & Co., Ld.* (2), on appeal from England. Reg. 7 imposes not merely an obligation in respect of the original construction of the platform, but as to its maintenance. It "shall be "supported"; no board or plank "shall project" beyond the permitted distance. If the duty is not fulfilled, the employer is liable for the consequences to his workmen, however blameless he may be, at least in the absence of some qualifying words in the Act or regulation. Even then the onus is on the employer to prove that he is entitled to rely on the qualification: *Britannic Merthyr Coal Co., Ld.* v. *David* (3); *Black* v. *Fife Coal Co., Ld.* (4). The statutes, however, there in question, like the Factory Acts, deal with criminal liability. The common law duty is superimposed on that. Hence the words qualifying the criminal offence are added in reference to criminal liability, and there is still the question whether they afford a defence against claims in respect of civil liability, which may depend on the particular words of the statute or statutory order. In *Watkins* v. *Naval Colliery Co. (1897), Ld.* (5), Lord Atkinson says that they do, though it is for the employer "to prove the facts which relieve him from liability "for the acts done by one of his workmen in violation of the "general rules." To the same effect Lord Kinnear, in *Black* v. *Fife Coal Co., Ld.* (6), treats the qualifying words in the Coal Mines Regulation Act, 1887, as "an essential part of the "definition of the offence" and suggests that, if the employer

(1) [1934] A. C. 1.
(2) [1940] A. C. 242.
(3) [1910] A. C. 74.
(4) [1912] A. C. 149.
(5) [1912] A. C. 693, 705.
(6) [1912] A. C. 149, 165.

can prove that he is not in fault, he has committed no offence and is guilty of no breach of duty. The point has not arisen precisely for decision, but I should be disposed to think that prima facie qualifying words in the statute which are directed to affording a defence against criminal responsibility do not affect civil liability to answer for damages caused by a breach of the duty to the workman. It is, however, enough in the present case to rest on the words relied on in this connexion by the respondents, in particular s. 137 of the Factories Act, 1937, which was in force at the material time. Section 130 provides that, in the event of any contravention of any regulation or order, the occupier or owner is to be guilty of an offence. The respondent in this case is the "occupier" of the notional "factory" constituted by the premises, and is, therefore, guilty of an offence in respect of the contravention. Then s. 136 provides that where an act or default for which an owner or occupier is liable is in fact the act or default of some servant or agent, the latter shall be guilty of an offence. Sect. 137 further enables the owner or occupier to exempt himself from the fine or other penalty when charged with an offence, that is, in the criminal proceedings with which the section is dealing, if he brings before the court the actual offender and proves that he used all due diligence and that the actual offender committed the offence without his consent, connivance or actual approval, and the actual offender is convicted. Thereupon, the occupier or owner is not to be guilty of the offence. These provisions show clearly that the offence is primarily that of the employer. There it must remain unless the employer is able to exempt himself from criminal liability under s. 137. In the present case the respondent has not satisfied the conditions of that section or done anything under it, and, therefore, cannot claim that he has not been guilty of the offence. He has clearly been guilty of a breach of his statutory duty to the deceased man. I am not, however, as at present advised, disposed to think that, if he had fulfilled the requirements of s. 137, his breach of duty to the workman would have been adeemed, but the question can be left for decision if or when it arises. It does not arise in this case. It may, indeed, be noted that sub-s. 1 of s. 137 does not apply to Scotland: see s. 156, sub-s. 17. The defence here fails. In my judgment, the appeal should be allowed.

Lord Porter. My Lords, the First Division of the Court of Session dismissed the appellant's appeal and held that she was not entitled to recover from the respondent damages for the death of her husband. The facts have been stated and raise three points for your Lordships' consideration: (i.) whether the cement mixer, referred to in the case, which was worked by mechanical power, was "within the area of the building "under construction" so as to make the place on which the deceased man was working subject to the same provisions as if it was a factory ; (ii.) whether, if it was so subject, the plank which fell and caused his death was part of a working platform within the meaning of that expression as used in reg. 7 of the Building Regulations, 1926 ; (iii.) whether the duty imposed on the employers by reg. 7 of the regulations made under s. 79 of the Factory and Workshop Act, 1901, is an absolute obligation and, if it is, whether the employer is excused from civil liabilities if he furnishes the proof required by s. 141 of that Act or the proof required by s. 137 of the Factories Act, 1937.

(i.) The first question depends on the true construction of the words introductory to the numbered regulations and the application of the facts to that construction. "The regulations," it is said, "shall apply to all premises on which "machinery worked by . . . . mechanical power is temporarily "used for the purpose of the construction of a building . . . . "Provided that nothing in these regulations except para. 45 "shall apply to premises on which the only machinery worked "by . . . . mechanical power consists (*a*) of machinery which "is not used for hoisting purposes and is outside the area of "the building under construction." Was then this cement mixer outside that area ? The Inner House by a majority held that it was. They reached their conclusion in this way. The extent of the area denoted by the phrase "premises on "which the machinery is worked" must, they said, be wider than that comprised in the expression "area of the building "under construction." That wider area could at most include the place at which building was going on. It could not embrace places where all building operations were finished. If then the wider area meant only that portion on which building was proceeding, it was not possible to find any defined narrower area unless it were a house or the house on which building operations were being conducted. With all respect to the majority of the Inner House, I do not find myself able to take this view. "All premises on which machinery worked "by mechanical power is used" may, I think, be part of the premises on which building is going on or may include any spot inside or outside that area on which the machinery is placed for the purpose of constructing the building, at any rate if it is not too far away. The area of the building under construction may, I think, be different from or narrower than the premises so defined—narrower than, if it forms part of those premises: different from, if the machinery is placed on one piece of land and the building operations are going on on another. It was suggested in the course of the argument that the ground plan of the building under construction must alone be included in the narrower area because the Interpretation Act, 1889, applied, it is true, to an Act of Parliament but not to regulations made under it. Let me assume without deciding the point that the Interpretation Act does not apply to the regulations, yet where, as here, the words of the Act are repeated totidem verbis in the regulations, I am of opinion, in common with all your Lordships, that when used in the regulations they must bear the same interpretation as in the Act, and that, therefore, in these regulations "building under construction" means "building or buildings." If, then, "premises" means either the general building site or some other place in which machinery, worked by mechanical power and used for the purpose of the construction, is erected, "the area of the building under "construction" may well mean that part of the building site on which buildings are in process of being constructed or, as Mr. Paull put it, "the space occupied by "the operation of building the building or buildings under "construction." For my own part, I should naturally so construe it, and I find it difficult to believe that the regulations were intended to apply only to a case where the mixer which was used was erected within the four walls of one of the houses under construction. In small house building operations I should have thought it extremely unlikely that it would be so placed and, judging from the scope of the regulations, I do not think that they were intended to guard against risk of injury from the machinery only. I think they were rather intended to guard the workers against the general danger involved in building operations when those operations are on a large scale owing either to the size or number of the buildings to be erected. But, if the object were to afford protection against the machinery only, still I should not expect the workmen to be protected against damage in falling from a plank placed inside the building whereas he would have none if he fell from outside scaffolding on to a mixer placed outside the walls. Ultimately, no doubt, the question whether the machinery is outside or inside the area of the building under construction is a question of degree, but here, as I understand the opinions of the members of the Inner House, they find that the mixer was among the buildings actually then under construction, was only twenty-three yards from that on which the deceased man was working, but must be held to be outside the area of the building under construction only because of the view taken by them as to the meaning of those words. It is true that the word "premises" appears to be used with a narrower meaning than that which I have adopted above in defining the words "textile factory" in s. 149 of the Act, but s. 149 does not purport to define "premises." It merely shows the sense in which that word is used in another part of the Act where it takes its colour from its surroundings. That section, therefore, should not, in my opinion, be relied on in determining the construction to be put on the word "premises" in the introductory part of the regulations.

(ii.) The view which I have adopted was that which commended itself to Lord Carmont, though he, like the rest of the Inner House, was for dismissing the appeal, but on another ground. In his view, the regulations generally did apply, but reg. 7 did not, because the board which slipped, having been placed there by an unauthorized person, formed no part of the working platform. This, in my view, is a more attractive argument than the other, but I do not think it is sound. A working platform is, I think, that platform which is actually in use, whether originally provided by the building contractor or added to or subtracted from by one of the workmen engaged on the site, even if he has no authority to make an alteration. When the platform is in use and the additional plank is there, it, in fact, constitutes the support on which the workman is carrying out his task, and to say that the employer did not mean it to be used in that condition is merely to put forward an argument which has failed to carry conviction certainly since the decision in *Groves* v. *Wimborne* (*Lord*) (1), namely, that the employer is not responsible for the unauthorized acts of those in his employment. The true view is that he is responsible for a breach of statutory duty whether

(1) [1898] 2 Q. B. 402.

the breach be due to an act or omission on his own part or on that of some other person.

(iii.) In these observations I am assuming the statutory duty to be absolute, a question which must now be considered. Does then reg. 7 impose an absolute duty on the employer or only a duty to use care, and in either case can he excuse himself under s. 141 of the Act of 1901 or s. 137 of the Act of 1937? That the obligation is absolute appears, I think, from the wording of reg. 7 itself. It is not enough that the employers took all care to see that it was complied with. I see no more reason for limiting their duty in this respect than I do for limiting the duty imposed on the owner to fence machinery in a mine: see *David* v. *Britannic Merthyr Coal Co., Ld.* (1). The platform is to be supported not only on its erection but throughout its existence.

If, then, the additional plank formed part of the working platform and the obligation that no plank of that platform shall project beyond its end support to a distance exceeding four times its thickness be absolute, it only remains to consider whether the employers are civilly liable for any breach of the regulations or whether there are circumstances in which they are excused. The regulations were originally made under the Act of 1901, but are now applicable under the Factories Act, 1937, and it is to the latter Act one must look in considering what was the liability of the employer when the accident in question occurred. Like the earlier Factory Acts, that Act makes no provision as to civil liability for breach of its enactments or of regulations made under it, but it does deal with what is to happen in the case of criminal proceedings. Under the Act of 1901, s. 141, the employer appears to have had the right by notice to bring the real offender before the court and so to have escaped the imposition of a penalty for his offence but not to have freed himself from the guilt of having committed it, but under s. 137, sub-s. 1, of the Act of 1937, it is provided that if he proves "(*a*) that he has used all "diligence to enforce the execution of this Act and of any "relevant order or regulation made thereunder; and (*b*) that "the said other person had committed the offence in question "without his consent, connivance, or wilful default, that "other person shall be summarily convicted of the offence "*and the occupier or owner shall not be guilty of the offence.*" The italics are mine. Under s, 137, sub-s. 2, it is provided

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(1) [1909] 2 K. B. 146, 154, 165; [1910] A. C. 74.

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that in similar circumstances the inspector shall proceed against the person whom he believes to be the actual offender without first proceeding against the occupier or owner of the factory. By s. 156, sub-s. 17, of the Act, which deals with its application to Scotland, it is provided that s. 137, sub-s. 1, shall not apply, and it may be that the occupier and owner must rely on s. 137, sub-s. 2, only.

I assume, however, without deciding that the respondent in the present case has established the necessary facts to show that he was not guilty of an offence. Does this assumption provide him with a defence against civil liability ? That it does not was, I think, in terms held by Fletcher Moulton L.J. in *David* v. *Britannic Merthyr Coal Co., Ld.* (1), which was affirmed on appeal (2). In upholding the decision of the Court of Appeal, however, this House expressly dissented from some of the propositions involved in their judgment. I think that the observations of Fletcher Moulton L.J. may have been aimed at, but the propositions are not specified, and in any case the remarks of the members of the House sitting to hear that case were in this respect obiter dicta and are not binding on your Lordships. *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (3) affirmed that the obligations imposed by the Coal Mines Regulation Act, 1887, s. 16, sub-s. 1, were absolute, but Lord Atkinson (4), referring to certain provisions in s. 50 of that Act analogous to those of s. 137 of the Act of 1937, said : "Nothing can, I think, be plainer "than that" (s. 50) "is a matter of defence to the criminal "liability, the burden of proving which rests upon the owner, "agent or manager, as the case may be, who desires to "exculpate himself. And if it be a defence against criminal "responsibility it is clearly, I think, a matter of defence "against civil responsibility also." The suggestion appears to receive some support from the observation of Lord Kinnear in *Black* v. *Fife Coal Co., Ld.* (5) : "If any person whosoever, "other than the owner himself, has contravened a rule, the "owner has committed no breach of duty and is guilty of no "offence, provided he can prove that he has taken all reasonable "means to the best of his power to prevent such contravention." But too great weight must not be attached to either statement as supporting the arguments of the respondent in the present

(1) [1909] 2 K. B. 146.
(2) [1910] A. C. 74.
(3) [1912] A. C. 693.
(4) [1912] A. C. 693, 705.
(5) [1912] A. C. 149, 165.

case, since it is clear that ss. 49 and 50 of the Act of 1887, with which the noble and learned Lords were dealing, did not impose an absolute duty on the mineowner. Section 50, it is true, makes a breach of the regulations set out in s. 49 a criminal offence, but the duty imposed by s. 49 is not to observe the provisions of the rules absolutely, but only "so far "as is reasonably practicable." Lord Kinnear expressly points out this fact in the latter case (1), and, in the former, Lord Atkinson's observations are directed to the same two sections and not to s. 16, as to which all their Lordships who were present held the duty to be absolute. Which principle, then, is to be applied in the present case: the view of Fletcher Moulton L.J. in *David* v. *Britannic Merthyr Coal Co., Ld.* (2), criticized though it may have been by members of your Lordships' House, or that contained in the words of Lord Atkinson in reference to the breach of a regulation not absolute in its terms: *Watkins* v. *Naval Colliery Co.* (1897), *Ld.* (1)? My Lords, in my view, the former ought to prevail. Criminal and civil liability are two separate things. A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability. An obvious illustration is the difference between the degree of negligence in accident cases required to prove the crime of manslaughter and that sufficient to create civil liability. The legislature might well be unwilling to convict an owner who failed to carry out an absolute statutory duty of a crime with which he was not himself directly concerned, but still be ready to leave the civil liability untouched. I but repeat what has been said on numerous occasions in your Lordships' House in saying that negligence is the failure to use the requisite amount of care required by the law in the case where a duty to use care exists. At common law the degree required is that expected of the "reasonable man." When a statutory duty is imposed, if it be absolute the degree required is the fulfilment of the statutory obligation. If it be not fulfilled the person on whom the duty is imposed is negligent: see *Lochgelly Iron and Coal Co., Ld.* v. *M'Mullan* (3), and though that negligence may not amount to criminal negligence so as to constitute an offence, it still may be and, I think, must be negligence sufficient to impose a civil liability. The duty is broken though no crime has been committed. In such a

(1) [1912] A. C. 149, 160.
(2) [1909] 2 K. B. 146.
(3) [1934] A. C. 1.

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case not only does the statute ordain the degree of care required, but it also, in my opinion, points out the dividing line between criminal and civil negligence, and, while it frees the employer from the former on proof that he has fulfilled certain requirements, it leaves the latter untouched.

For the reasons I have given, I think the appeal should be allowed, and that the appellant should be awarded the damages suggested by the Lord President, which both parties are now prepared to accept as binding on them.

Appeal allowed.

Solicitors for appellant: *W. H. Thompson, for Baillie & Gifford, W.S., Edinburgh, and Wilson, Chalmers & Hendry, Glasgow.*

Solicitors for respondent: *W. C. Crocker, for D. G. M'Gregor, W.S., Edinburgh, and Digby Brown & Co., Glasgow.*

F. H. C.

Distinguished. Boissevain *v.* Weil.
[1949] 1 K. B. 482

[HOUSE OF LORDS.]

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Apr. 16, 17, 20, 21, 23, 24;
June 15.

FIBROSA SPOLKA AKCYJNA . . . Appellants;

AND

FAIRBAIRN LAWSON COMBE BARBOUR, LIMITED . . . . . . Respondents.

Contract — Frustration — Payment on account of purchase price — Recovery—Failure of consideration.

By a contract in writing dated July 12, 1939, the respondents, an English company, agreed to sell and the appellants, a Polish company, agreed to purchase machinery for 4800*l.* of which one-third was to be paid with the order. Delivery was to be three to four months from settlement of final details and the goods were to be packed and delivered c.i.f. Gdynia, Poland. The sale was made subject to certain conditions and cl. 7 was as follows: "Should dispatch be hindered or delayed . . . . by any "cause whatsoever beyond our reasonable control, including ". . . . . war . . . . a reasonable extension of time shall be granted." Only 1000*l.* out of the sum of 1600*l.* to be paid with the order was in fact paid. On September 1, 1939, war broke out between Germany and Poland and on September 3 Great Britain declared

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**Present:* Viscount Simon L.C., Lord Atkin, Lord Russell of Killowen, Lord Macmillan, Lord Wright, Lord Roche and Lord Porter.

Abd: Thornton v. Maughan

war on Germany. On and after September 23, Gdynia was occupied by the Germans :—

Held, (1.) that, cl. 7 being limited in its ambit to a delay in respect of which " a reasonable extension of time " might be granted, did not prevent frustration of the contract by reason of the war on the ground that it made express provision for that contingency, since this war involved prolonged and indefinite interruption of prompt contractual performance ; and (2.) that, there having been a total failure of consideration and the payment of the 1000*l*. being, under the terms of the contract, a conditional payment on account of the purchase price and not an absolute, final, or " out and out " payment, the appellants could recover that sum from the respondents.

Where a contract on its true construction stipulates that a particular result shall follow, if frustration should afterwards occur, that stipulation governs the matter, and the rule that freight paid in advance is not to be returned if completion of the voyage is frustrated should be regarded as a stipulation introduced into such contracts by custom. But, in the absence of a term of the contract dealing with the matter, there is no principle that where a contract has been frustrated by such a supervening event as releases from further performance " the loss lies where it falls " in the sense that sums paid or rights accrued before that event are not to be surrendered. The claim of a party who has paid money under a contract, to recover it on the ground that the consideration for which he paid it has wholly failed is not based on any provision in the contract, but arises because in the circumstances the law gives a remedy in quasi-contract to the party who has not got what he bargained for. Although, in the formation of a contract, a promise to do a thing may be the consideration, in dealing with the law of failure of consideration and the right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but its performance.

Chandler v. *Webster* [1904] 1 K. B. 493, overruled.

Decision of the Court of Appeal (*sub nom. Fibrosa Société Anonyme* v. *Fairbairn Lawson Combe Barbour, Ld.*) [1942] 1 K. B. 12, reversed.

APPEAL from the Court of Appeal.

The facts as stated by VISCOUNT SIMON L.C. were as follows : The respondents were a limited company carrying on at Leeds the business of manufacturing textile machinery, and by a contract in writing dated July 12, 1939, the respondents agreed to supply the appellants, a Polish company, of Vilna, with certain flax-hackling machines as therein specified and described, at a lump-sum price of 4800*l*. The machines were of a special kind. The place of erection of the machinery was not mentioned in the contract, but it was agreed that it was the intention of the parties that it was to be erected at Vilna. By

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the terms of the contract, delivery was to be in three to four months from the settlement of final details. The machines were to be packed and delivered by the respondents c.i.f. Gdynia, the services of a skilled monteur to superintend erection were to be provided by the respondents and included in the price, and payment was to be made by cheque on London, one-third of the price (1600*l.*) with the order and the balance (3200*l.*) against shipping documents. By cl. 7 of the conditions of sale attached to the contract: " . . . . . Should "dispatch be hindered or delayed by your instructions, or "lack of instructions, or by any cause whatsoever beyond our "reasonable control including strikes, lock-outs, war, fire, "accidents . . . . a reasonable extension of time shall be "granted. . . ." By cl. 10 provisions were made for dispatch and possible storage pending dispatch.

On July 18, 1939, the appellants paid to the respondents 1000*l.* on account of the initial payment of 1600*l.* due under the contract. On September 1, 1939, Germany invaded Poland and on September 3 Great Britain declared war on Germany. On September 7, the appellants' agents in England wrote to the respondents: " Owing to the outbreak of hostilities, it is "now quite evident that the delivery of the hackling machines "on order for Poland cannot take place. Under the circumstances we shall be obliged if you will kindly arrange to "return our initial payment of 1000*l.* at your early "convenience." To this request, the respondents replied on the next day refusing to return the sum and stating that "considerable work has been done upon these machines " and we cannot consent to the return of this payment. "After the war the matter can be reconsidered." There was further correspondence between the parties or their agents which failed to produce agreement, and on May 1, 1940, the appellants issued a writ and by their statement of claim alleged that the respondents had broken the contract by refusing to deliver the machines, while the appellants "are "and have at all material times been ready and willing to take "delivery of the said machinery and to pay for the same." The prayer of the claim was (*a*) for damages for breach of contract, (*b*) for specific performance or, alternatively, return of the 1000*l.* with interest, and (*c*) for further or other relief. The substantial defence of the respondents was that the contract had been frustrated by the German occupation of Gdynia in September, 1939, and that in these circumstances the appellants had no right to the return of the 1000*l.* Tucker J. dismissed the action on March 7, 1941, and the Court of Appeal affirmed his decision on May 15, 1941. The appellants appealed to the House of Lords.

Linton Thorp K.C. and *Sebag Shaw* for the appellants. The appellant company, which has its head and seat at Vilna in Poland is seeking to recover a sum paid in advance in respect of machinery to be manufactured by the respondents and delivered at Gdynia, which was occupied by hostile forces before the date of delivery. [VISCOUNT SIMON L.C.: If the appellant company, as things now stand, has its head and seat at Vilna, must it not be regarded as an alien enemy? An alien enemy cannot sue in the King's courts without the licence of the Crown, and, though when this action was tried and when it was heard in the Court of Appeal, Vilna was not occupied by the Germans, it is now effectively so occupied (1). It seems to me, therefore, that the appellant needs a licence from the Crown, in accordance with the decision in *Porter* v. *Freudenberg* (1).] We have not asked for any licence. [VISCOUNT SIMON L.C.: I should suppose that the Board of Trade would be willing to give you any necessary licence. We will proceed with the hearing of the appeal on that assumption, but we shall expect, before your argument is concluded, to hear that you have put yourself in order.] The proper application will be made to the Board of Trade (2). The bargain between the parties under cl. 7 of the conditions of sale was that, if war broke out and dispatch was thereby hindered, a reasonable time should be allowed to enable arrangements for storage to be made under cl. 10. The appellants were entitled to take delivery at Leeds and in failing to deliver the goods the respondents broke the contract. On the outbreak of war the contract was merely suspended and while it was so suspended it was repudiated by the respondents. There was no commercial venture between the parties which could be frustrated within the meaning of the authorities

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(1) Vilna is situated in that part of eastern Poland occupied by the Russian forces after they invaded the country on September 16, 1939. In October, 1939, it was absorbed into Lithuania, which was itself absorbed into Russia in August, 1940. After the German invasion of Russia in June, 1941, it was occupied by the German forces.

(1) [1915] 1 K. B. 857.

(2) A licence from the Board of Trade was obtained and produced on April 17, 1942.

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dealing with frustration, but, even if there were, performance was not impossible having regard to the terms of the contract. The doctrine of frustration rests on an implied term, but a term cannot be implied to contradict an express term, and here the outbreak of war was expressly provided for by cl. 7. In any case, if the court has power to imply a term in the contract, it must imply a reasonable term and not a term such as no commercial man would think of entering into. A term which allowed the respondents to retain the money in the circumstances of this case would not be reasonable, since, as regards the goods, they have sustained no loss. Such a conception is known to the law of Scotland: see *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (1). Even if the contract has been frustrated, there has been a total failure of consideration and the appellants are entitled to the return of the money. Their right to recover it arises, not ex contractu, but by operation of law since the law gives a remedy in quasi-contract to a party who has not got what he bargained for. The rule in *Chandler* v. *Webster* (2) that on the determination of a contract by impossibility of performance the loss lies where it falls cannot apply in respect of moneys paid in advance so as to deprive the payer of the right to recover it as money received to his use where the consideration for which the money was paid has wholly failed. The doctrine of failure of consideration is not limited to cases where the contract is rescinded ab initio. *Taylor* v. *Caldwell* (3) did not go as far as it was pushed in *Chandler* v. *Webster* (2). [They referred to *Williams* v. *Lloyd* (4); *Rugg* v. *Minett* (5); *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (6); *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (7); *Sinclair* v. *Brougham* (8); *Lee* v. *Griffin* (9); *Rowland* v. *Divall* (10); *Devaux* v. *Conolly* (11); Partnership Act, 1890, s. 40; Lindley on Partnership, 10th ed., pp. 684–690, and Sale of Goods Act, 1893, s. 5, sub-s. 1, and s. 27.]

Valentine Holmes and *G. O. Slade* for the respondents. The rule in *Chandler* v. *Webster* (2) is right and is good law.

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(1) [1924] A. C. 226, 245, 246.
(2) [1904] 1 K. B. 493.
(3) (1863) 3 B. & S. 826.
(4) (1628) W. Jo. 179.
(5) (1809) 11 East, 210.
(6) [1903] 2 K. B. 756.
(7) [1921] 2 A. C. 494.
(8) [1914] A. C. 398.
(9) (1861) 1 B. & S. 272.
(10) [1923] 2 K. B. 500, 502.
(11) (1849) 8 C. B. 640.

Even if originally it could not be supported it is now too firmly established to be disturbed. In any event, it is not so manifestly wrong as to justify the House of Lords in overruling it after it has been affirmed and followed in so many cases during nearly forty years and applied and acted on by the whole commercial community, especially during the last two years, in working out the rights of parties to contracts. It constitutes a simple rule against which the parties can provide by express terms if they so desire. It is the best rule from the point of view of justice which it was possible for the judges, as distinct from the legislature, to devise. The rule is in effect that the loss lies where it falls and it has great advantages in that (1.) it is easily understood by the commercial community, (2.) it is easily applied by them, and (3.) it does rough justice between the parties in cases where some degree of hardship is inevitable. *Lumsden* v. *Barton & Co.* (1); *Blakeley* v. *Muller & Co.* (2) ; *Clark* v. *Lindsay* (3) ; *Griffith* v. *Brymer* (4) ; *Krell* v. *Henry* (5) ; and *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (6)—"the coronation "cases"—were all instances of the application of the rule before the decision in *Chandler* v. *Webster* (7) in which the Court of Appeal followed *Taylor* v. *Caldwell* (8). There is no case in the past century where the rule has not been applied : see *Anglo-Egyptian Navigation Co.* v. *Rennie* (9) and *Russkoe Obschestvo d'lia Izgstovlenia Snariadov I'voennick Pripassov* v. *John Stirk & Sons, Ld.* (10). It was accepted by the House of Lords in *French Marine* v. *Compagnie Napolitaine d'Eclairage et de Chauffage par le Gaz* (11) : see also the Seventh Interim Report of the Law Revision Committee on the rule. There is no distinction between the present case and that of advance freight which is never returnable. This is an instance of a final payment which cannot be recovered : see *Chandler* v. *Webster* (12) per Mathew L.J. and *Anglo-Egyptian Navigation Co.* v. *Rennie* (9). The doctrine of frustration rests on a condition to be implied in the contract under consideration. If the implied condition in the present contract had been express its effect would have been that the respondents agreed

(1) (1902) 19 T. L. R. 53.
(2) [1903] 2 K. B. 760 *n.*
(3) (1903) 88 L. T. 198.
(4) (1903) 19 T. L. R. 434.
(5) [1903] 2 K. B. 740.
(6) [1903] 2 K. B. 756.
(7) [1904] 1 K. B. 493.
(8) 3 B. & S. 826.
(9) (1875) L. R. 10 C. P. 271.
(10) (1922) 10 Ll. L. Rep. 214.
(11) [1921] 2 A. C. 494, 523.
(12) [1904] 1 K. B. 493, 502.

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that, on the appellants paying them 1600*l.*, they would proceed with making the machinery to their specification, would deliver it at Gdynia, and would provide the services of a skilled workman, subject to the condition that, if Gdynia became enemy territory, both parties would be excused further performance. The respondents did not undertake such an obligation to deliver that, if complete performance became impossible, they would repay the money notwithstanding the expenses incurred in part performance. The date of the contract was July, 1939, and the court can take judicial notice of the state of international affairs then. The machines to be manufactured were of an unusual type. The respondents were taking the payment to provide against any possible contingency. In making the contract the parties must have envisaged the possibility of its premature determination by frustration. So far as the actual manufacture of the machines was concerned there could be no question of impossibility of performance. The contract has been partly performed, and so there can be no claim for the return of the money on the ground that the consideration has wholly failed. The consideration for the payment made was the respondents' promise to deliver the goods c.i.f. Gdynia. The respondents, by merely binding themselves by a contractual obligation, suffered a detriment and that was sufficient consideration: see *Currie* v. *Misa* (1) and Anson on the Law of Contract, 18th ed., pp. 88 et seq. The moment the contract was entered into the consideration started. On any view, the consideration has only partly failed and so the money is irrecoverable. Further, there was no fault on the part of the respondents, and, therefore, even if the consideration had wholly failed, there could be no claim for the return of this payment. [They referred to *Stubbs* v. *Holywell Railway Co.* (2); *Appleby* v. *Myers* (3); *Byrne* v. *Schiller* (4); *Whincup* v. *Hughes* (5); *Johnson* v. *Goslett* (6); *Lloyd Royal Belge Société Anonyme* v. *Sthathatos* (7); *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (8); *W. J. Tatem, Ld.* v. *Gamboa* (9); *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting*

(1) (1875) L. R. 10 Ex. 153.
(2) (1867) L. R. 2 Ex. 311.
(3) (1867) L. R. 2 C. P. 651.
(4) (1871) L. R. 6 Ex. 319.
(5) (1871) L. R. 6 C. P. 78, 85.
(6) (1857) 3 C. B. (N. S.) 569.
(7) (1917) 33 T. L. R. 390.
(8) [1926] A. C. 497.
(9) [1939] 1 K. B. 132.

Corporation, Ld. (1) ; *Rugg* v. *Minett* (2) ; *Wilson* v. *Church* (3) ; *National Bolivian Navigation Co.* v. *Wilson* (4) ; *Ockenden* v. *Henley* (5) and Smith's Leading Cases, 13th ed., vol. ii., pp. 1 et seq.] The provisions of cl. 7 of the conditions of sale do not cover the matter since it dealt only with delays in respect of which a reasonable extension of time might be granted. The war in which Great Britain was engaged must on the contrary be assumed to be of indefinite duration : *Geipel* v. *Smith* (6), *Bank Line, Ld.* v. *Arthur Capel & Co.* (7). Even though the parties have provided for the case of limited interruption, that does not prevent frustration of the contract in these circumstances : *Jackson* v. *Union Marine Insurance Co., Ld.* (8).

Thorp K.C. in reply. *In Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (9) ; *Chandler* v. *Webster* (10) was treated as being open to further consideration. The House of Lords has before now overruled a long standing line of authorities : *Bourne* v. *Keane* (11).

The House took time for consideration.

1942. June 15. VISCOUNT SIMON L.C. My Lords, this is the appeal of a Polish company who were plaintiffs in the action against the decision of the Court of Appeal composed of MacKinnon and Luxmoore L.JJ. and Stable J., affirming the judgment of Tucker J. at the trial in favour of the respondents. After the Court of Appeal's judgment and before the appeal came to be argued at your Lordships' bar, the town of Vilna, where the appellants had carried on its business, and indeed the whole of Poland, under the laws of which state the appellants were incorporated, were occupied by our enemy, Germany. The question might, therefore, arise whether the appellants should now be debarred from prosecuting its appeal : see the judgment of the Court of Appeal delivered by Lord Reading C.J. in *Porter* v. *Freudenberg* (12), and *Rodriguez* v. *Speyer Bros.* (13). To obviate any difficulty on this head, the appellants, at the suggestion of the House, applied to the

(1) [1942] A. C. 154.
(2) 11 East, 210.
(3) (1879) 13 Ch. D. 1.
(4) (1880) 5 App. Cas. 176.
(5) (1858) E. B. & E. 485.
(6) (1872) L. R. 7 Q. B. 404, 414.
(7) [1919] A. C. 435.
(8) (1873) L. R. 8 C. P. 572.
(9) [1924] A. C. 226.
(10) [1904] 1 K. B. 493.
(11) [1919] A. C. 815.
(12) [1915] 1 K. B. 857, 868, 884.
(13) [1919] A. C. 59.

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Board of Trade, and the department gave to the appellants' solicitors a licence to proceed with the appeal, notwithstanding that their clients might be in the position of an alien enemy. The House was content to let the case proceed on this basis. It is not, therefore, necessary to consider, in dealing with the present appeal, whether the recent decision of the Court of Appeal in *In re an Arbitration between N. V. Gebr. van Udens Scheepvaart en Agentuur Maatschappij* v. *Sovfracht* (1), should be approved. If, as the result of the decision of the House, any payment becomes due to the appellants, and if they were in the position of alien enemies within the meaning of the Trading with the Enemy Act, 1939, the payment would be regulated by that Act.

Before passing to the main question involved in the appeal, I must mention another contention of the appellants which was based on cl. 7 of the conditions of sale attached to the contract. This clause contained the provision that "should "dispatch be hindered or delayed by . . . . any cause beyond "our reasonable control including . . . . war . . . . a reason- "able extension of time shall be granted." The appellants argued that there could be no frustration by reason of the war which broke out during the currency of the contract because this contingency was expressly provided for in cl. 7, and, therefore, there was no room for an implied term such as has often been regarded as a suitable way in which to express and apply the doctrine of frustration. I entirely agree with the Court of Appeal that in the circumstances of the present case this is a bad point. The ambit of the express condition is limited to delay in respect of which "a reasonable "extension of time" might be granted. That might mean a minor delay as distinguished from a prolonged and indefinite interruption of prompt contractual performance which the present war manifestly and inevitably brings about. A similar argument was unsuccessfully urged in *Bank Line, Ld.* v. *Arthur Capel & Co.* (2) and in other cases, a recent instance of which is *W. J. Tatem, Ld.* v. *Gamboa* (3). The principle is that where supervening events, not due to the default of either party, render the performance of a contract indefinitely impossible, and there is no undertaking to be bound in any event, frustration ensues, even though the parties may have expressly provided for the case of a limited interruption.

(1) [1942] 1 K. B. 222.
(2) [1919] A. C. 435.
(3) [1939] 1 K. B. 132.

As MacKinnon L.J. points out (1), the unsoundness of the contrary view is implicit in *Jackson* v. *Union Marine Insurance Co., Ld.* (2), for the charterparty in that case contained an exception of perils of the sea (3), but none the less the contract was held to have been terminated and the adventure to have been frustrated by the long delay due to the stranding of the ship. The situation arising from the outbreak of the present war, so far as this country, Germany and Poland are concerned, makes applicable Lush J.'s well-known observation in *Geipel* v. *Smith* (4): "A state of war" (in that case the Franco-German war of 1870) "must be presumed to be likely to "continue so long and so to disturb the commerce of merchants "as to defeat and destroy the object of a commercial adventure "like this." There is a further reason for saying that this subsidiary contention of the appellants must fail, namely, that, while this country is at war with Germany and Germany is occupying Gdynia, a British subject such as the respondents could not lawfully make arrangements to deliver c.i.f. Gdynia, and, therefore, the contract could not be further performed because of supervening illegality. A provision providing for a reasonable extension of time if dispatch is delayed by war cannot have any application when the circumstances of the war make dispatch illegal: *Ertel Bieber & Co.* v. *Rio Tinto Co., Ld.* (5).

Mr. Linton Thorp, in conducting the argument for the appellants before us, admitted that, if the point with which I have already dealt was decided against him, the only other issue to be determined was whether, when this contract became frustrated, the appellants could, in the circumstances of the present case, claim back from the respondents the 1000*l.* which they had paid when placing the order. As to this, MacKinnon L.J., in delivering the judgment of the Court of Appeal, said (6): "Tucker J. held that having regard to "the principle laid down in *Chandler* v. *Webster* (7) and other "like cases, this claim must fail. We think he was right, and, "further, that that principle must equally bind this court to "reject the claim. Whether the principle can be overruled is "a matter that can only concern the House of Lords." This alleged principle is to the effect that where a contract has

(1) [1942] 1 K. B. 12, 26.
(2) (1874) L. R. 10 C. P. 125.
(3) L. R. 8 C. P. 572, 584.
(4) L. R. 7 Q. B. 404, 414.
(5) [1918] A. C. 260.
(6) [1942] 1 K. B. 12, 27.
(7) [1904] 1 K. B. 493.

been frustrated by such a supervening event as releases from further performance, "the loss lies where it falls," with the result that sums paid or rights accrued before that event are not to be surrendered, but all obligations falling due for performance after that event are discharged. This proposition, whether right or wrong, first appears, not in *Chandler* v. *Webster* (1) but in *Blakeley* v. *Muller & Co.* (2), decided in January, 1903, by a Divisional Court, which was also a case arising out of the abandonment of the coronation procession owing to King Edward VII.'s sudden illness. In that case, Channell J. said (3): "If the money was payable on some "day subsequent to the abandonment of the procession, I do "not think it could have been sued for. If, however, it was "payable prior to the abandonment of the procession, the "position would be the same as if it had been actually paid "and could not be recovered back, and could be sued for ". . . . It is impossible to import a condition into a contract "which the parties could have imported and have not done "so. All that can be said is that, when the procession was "abandoned, the contract was off, not that anything done "under the contract was void. The loss must remain where "it was at the time of the abandonment. It is like the case "of a charterparty where the freight is payable in advance, "and the voyage is not completed, and the freight, therefore, "not earned. Where the non-completion arose through "impossibility of performance, the freight could not be "recovered back." In *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (4), which was decided in the Court of Appeal in October, 1903, Lord Halsbury L.C. expressed entire concurrence with this passage in the judgment of Channell J. Lord Alverstone C.J., who was a party to both these decisions, took the same view.

If we are to approach this problem anew, it must be premised that the first matter to be considered is always the terms of the particular contract. If, for example, the contract is "divisible" in the sense that a sum is to be paid over in respect of completion of a defined portion of the work, it may well be that the sum is not returnable if completion of the whole work is frustrated. If the contract itself on its true construction stipulates for a particular result which is to follow in regard to money already paid, should frustration afterwards occur, this governs the matter. The ancient and firmly established rule that freight paid in advance is not returned if the completion of the voyage is frustrated: *Byrne* v. *Schiller* (1); should, I think, be regarded as a stipulation introduced into such contracts by custom, and not as the result of applying some abstract principle. And so, a fortiori, if there is a stipulation that the prepayment is "out and out." To take an example, not from commerce, but from sport, the cricket spectator who pays for admission to see a match cannot recover the entrance money on the ground that rain has prevented play if, expressly or by proper implication, the bargain with him is that no money will be returned. Inasmuch as the effect of frustration may be explained as arising from an implied term: see *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (2); it is tempting to speculate whether a further term could be implied as to what was to happen, in the event of frustration, to money already paid, but, if the parties were assumed to have discussed the point when entering into the contract, they could not be supposed to have agreed on a simple formula which would be fair in all circumstances, and all that could be said is that, in the absence of such agreement, the law must decide. The question now to be determined is whether, in the absence of a term in the contract dealing with the matter, the rule which is commonly called the rule in *Chandler* v. *Webster* (3) should be affirmed.

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(1) [1904] 1 K. B. 493.
(2) [1903] 2 K. B. 760*n*.
(3) Ibid. 762*n*.
(4) [1903] 2 K. B. 756.

This supposed rule has been constantly applied in a great variety of cases which have since arisen—and necessarily so, because the rule had been laid down in plain terms by the Court of Appeal in England in 1904, and the present appeal provides the first occasion on which it can be effectively challenged. A very different rule prevails in Scotland, as was made plain by the decision of this House in *Cantiare San Rocco S. A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (4). In that case the Earl of Birkenhead (5) was careful to reserve the question whether *Chandler* v. *Webster* (3) and the other English cases on the point were rightly decided, saying: "The "question is as to the law of Scotland, and I desire to say "nothing which may in any way fetter opinion if those "authorities hereafter come to be reviewed by this House,

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(1) L. R. 6 Ex. 319.
(2) [1942] A. C. 154, 163.
(3) [1904] 1 K. B. 493.
(4) [1924] A. C. 226.
(5) Ibid. 233.

"for none of them is binding upon your Lordships." Similarly in the same case, Viscount Finlay (1) observed that it would be out of place on that occasion to enter into the question dealt with in *Chandler* v. *Webster* (2), adding: "The principle of English law was re-stated with great clearness "by Lord Parmoor in the case of *French Marine* v. *Compagnie* "*Napolitaine d'Eclairage et de Chauffage par le Gaz* (3). This "statement forms no part of the judgment of the House of "Lords in that case, but there is no doubt that the principle "has been repeatedly acted on in the Court of Appeal." Lord Dunedin in the *Cantiare San Rocco* case (4) referred to the different angle of approach from which an English or a Scottish judge would look at the question, and thought that the cause was to be found in the reluctance of the English law to order the repayment of money once paid. But he added: "I do not enlarge on the topic, for I am not at all "concerned to criticize English law . . . . For the purpose "of this case, it is sufficient to say, as I unhesitatingly do, "that *Chandler* v. *Webster* (2), if it had been tried in Scotland, "would have been decided the other way." Lord Dunedin's restraint was not imitated by Lord Shaw, whose pronouncement included a vigorous denunciation (5) of the proposition that the loss lies where it falls as amounting to a maxim which "works well enough among tricksters, gamblers and thieves." The learned Lord asserted that this was part of the law of England (presumably meaning that it had been so laid down by the English Court of Appeal), but patriotically rejoiced that it had never been part of the law of Scotland.

Mr. Valentine Holmes, in his able argument for the respondents, asked us to consider whether this House would be justified in disturbing a view of the law which has prevailed for nearly forty years, which has been so frequently affirmed, which has been constantly applied in working out the rights of the parties to commercial contracts, and which, moreover, at any rate furnishes a simple rule against the effect of which the parties to a contract can, if they so desire, expressly provide. These are weighty considerations, but I do not think they ought to prevail in the circumstances of this case over our primary duty of doing our utmost to secure that the law on this important matter is correctly expounded and applied. If the view which has hitherto prevailed in this

(1) [1924] A. C. 226, 241.
(2) [1904] 1 K. B. 493.
(3) [1921] 2 A. C. 494, 523.
(4) [1924] A. C. 226, 248.
(5) Ibid. 259.

matter is found to be based on a misapprehension of legal principles, it is of great importance that these principles should be correctly defined, for, if not, there is a danger that the error may spread in other directions, and a portion of our law be erected on a false foundation. Moreover, though the so-called rule in *Chandler* v. *Webster* (1) is nearly forty years old, it has not escaped much unfavourable criticism. My noble and learned friend Lord Atkin when sitting in the Court of Appeal as Atkin L.J., in *Russkoe Obschestvo d'lia Izgstovlenia Snariadov I'voennick Pripassov* v. *John Stirk & Sons, Ld.* (2), doubted whether any two business people in the world would ever make a contract which embodied such a doctrine as *Chandler* v. *Webster* (1) laid down, and in the present case the Court of Appeal, while bound by previous authority, hinted a hope that this House might be able to substitute a "more civilized rule" (3). I think, therefore, that we ought to regard ourselves as at liberty to examine the challenged proposition freely, and to lay down what we regard as the true doctrine in English law without being hampered by a course of practice based on previous decisions in the Court of Appeal.

The locus classicus for the view which has hitherto prevailed is to be found in the judgment of Collins M.R. in *Chandler* v. *Webster* (1). It was not a considered judgment, but it is hardly necessary to say that I approach this pronouncement of the then Master of the Rolls with all the respect due to so distinguished a common lawyer. When his judgment is studied, however, one cannot but be impressed by the circumstance that he regarded the proposition that money in such cases could not be recovered back as flowing from the decision in *Taylor* v. *Caldwell* (4). *Taylor* v. *Caldwell* (4), however, was not a case in which any question arose whether money could be recovered back, for there had been no payment in advance, and there is nothing in the judgment of Blackburn J., which, at any rate in terms, affirms the general proposition that " the loss lies where it falls." The application by Collins M.R. of *Taylor* v. *Caldwell* (4) to the actual problem with which he had to deal in *Chandler* v. *Webster* (5) deserves close examination. He said : " The plaintiff contends that "he is entitled to recover the money which he has paid "on the ground that there has been a total failure of

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(1) [1904] 1 K. B. 493.
(2) 10 Ll. L. Rep. 214.
(3) [1942] 1 K. B. 12, 28.
(4) 3 B. & S. 826.
(5) [1904] 1 K. B. 493, 499.

"consideration. He says that the condition on which he paid "the money was that the procession should take place, and "that, as it did not take place, there has been a total failure "of consideration. That contention does no doubt raise a "question of some difficulty, and one which has perplexed "the courts to a considerable extent in several cases. The "principle on which it has been dealt with is that which "was applied in *Taylor* v. *Caldwell* (1)—namely, that where, "from causes outside the volition of the parties, something "which was the basis of, or essential to the fulfilment of, the "contract has become impossible, so that, from the time when "the fact of that impossibility has been ascertained, the "contract can no further be performed by either party, it "remains a perfectly good contract up to that point, and "everything previously done in pursuance of it must be "treated as rightly done, but the parties are both discharged "from further performance of it. If the effect were that the "contract were wiped out altogether, no doubt the result "would be that money paid under it would have to be repaid "as on a failure of consideration. But that is not the effect "of the doctrine; it only releases the parties from further "performance of the contract. Therefore the doctrine of "failure of consideration does not apply."

It appears to me that the reasoning in this crucial passage is open to two criticisms: (*a*) The claim of a party, who has paid money under a contract, to get the money back, on the ground that the consideration for which he paid it has totally failed, is not based on any provision contained in the contract, but arises because, in the circumstances that have happened, the law gives a remedy in quasi-contract to the party who has not got that for which he bargained. It is a claim to recover money to which the defendant has no further right because in the circumstances that have happened the money must be regarded as received to the plaintiff's use. It is true that the effect of frustration is that, while the contract can no further be performed, "it remains a perfectly good contract up to "that point, and everything previously done in pursuance of it "must be treated as rightly done," but it by no means follows that the situation existing at the moment of frustration is one which leaves the party that has paid money and has not received the stipulated consideration without any remedy. To claim the return of money paid on the ground of total

(1) 3 B. & S. 826.

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failure of consideration is not to vary the terms of the contract in any way. The claim arises not because the right to be repaid is one of the stipulated conditions of the contract, but because, in the circumstances that have happened, the law gives the remedy. It is the failure to distinguish between (1.) the action of assumpsit for money had and received in a case where the consideration has wholly failed, and (2.) an action on the contract itself, which explains the mistake which I think has been made in applying English law to this subject-matter. Thus, in *Blakeley* v. *Muller & Co.* (1), Lord Alverstone C.J. said, "I agree that *Taylor* v. *Caldwell* (2) applies, "but the consequence of that decision is that neither party "here could have sued on the contract in respect of anything "which was to be done under it after the procession had been "abandoned." That is true enough, but it does not follow that because the plaintiff cannot sue "on the contract" he cannot sue dehors the contract for the recovery of a payment in respect of which consideration has failed. In the same case, Wills J. (1) relied on *Appleby* v. *Myers* (3), where a contract was made for the erection by A. of machinery on the premises of B., to be paid for on completion. There was no prepayment and in the course of the work the premises were destroyed by fire. It was held that both parties were excused from further performance, and that no liability accrued on either side, but the liability referred to was liability under the contract, and the learned judge seems to have thought that no action to recover money in such circumstances as the present could be conceived of unless there was a term of the contract, express or implied, which so provided. Once it is realized that the action to recover money for a consideration that has wholly failed rests, not on a contractual bargain between the parties, but, as Lord Sumner said in *Sinclair* v. *Brougham* (4), "upon a notional or imputed promise to repay," or (if it is preferred to omit reference to a fictitious promise) upon an obligation to repay arising from the circumstances, the difficulty in the way of holding that a prepayment made under a contract which has been frustrated can be recovered back appears to me to disappear. (*b*) There is, no doubt, a distinction between cases in which a contract is "wiped out "altogether," e.g., because it is void as being illegal from the start or as being due to fraud which the innocent party has

(1) [1903] 2 K. B. 760*n*, 761*n*.

(2) 3 B. & S. 826.

(3) L. R. 2 C. P. 651.

(4) [1914] A. C. 398, 452.

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elected to treat as avoiding the contract, and cases in which intervening impossibility "only releases the parties from "further performance of the contract." But does the distinction between these two classes of case justify the deduction of Collins M.R. that "the doctrine of failure of consideration "does not apply" where the contract remains a perfectly good contract up to the date of frustration? This conclusion seems to be derived from the view that, if the contract remains good and valid up to the moment of frustration, money which has already been paid under it cannot be regarded as having been paid for a consideration which has wholly failed. The party that has paid the money has had the advantage, whatever it may be worth, of the promise of the other party. That is true, but it is necessary to draw a distinction. In English law, an enforceable contract may be formed by an exchange of a promise for a promise, or by the exchange of a promise for an act—I am excluding contracts under seal—and thus, in the law relating to the formation of contract, the promise to do a thing may often be the consideration, but when one is considering the law of failure of consideration and of the quasi-contractual right to recover money on that ground, it is, generally speaking, not the promise which is referred to as the consideration, but the performance of the promise. The money was paid to secure performance and, if performance fails the inducement which brought about the payment is not fulfilled.

If this were not so, there could never be any recovery of money, for failure of consideration, by the payer of the money in return for a promise of future performance, yet there are endless examples which show that money can be recovered, as for a complete failure of consideration, in cases where the promise was given but could not be fulfilled: see the notes in Bullen and Leake's Precedents of Pleading, 9th ed., p. 263. In this connexion the decision in *Rugg* v. *Minett* (1) is instructive. There the plaintiff had bought at auction a number of casks of oil. The contents of each cask were to be made up after the auction by the seller to the prescribed quantity so that the property in a cask did not pass to the plaintiff until this had been done. The plaintiff paid in advance a sum of money on account of his purchases generally, but a fire occurred after some of the casks had been filled up, while the others had not. The plaintiff's action was to recover the money he had paid as money received by the defendants to the use of the plaintiffs. The Court of King's Bench ruled that this cause of action succeeded in respect of the casks which at the time of the fire had not been filled up to the prescribed quantity. A simple illustration of the same result is an agreement to buy a horse, the price to be paid down, but the horse not to be delivered and the property not to pass until the horse had been shod. If the horse dies before the shoeing, the price can unquestionably be recovered as for a total failure of consideration, notwithstanding that the promise to deliver was given. This is the case of a contract de certo corpore where the certum corpus perishes after the contract is made, but, as Vaughan Williams L.J.'s judgment in *Krell* v. *Henry* (1) explained, the same doctrine applies " to cases where "the event which renders the contract incapable of performance "is the cessation or non-existence of an express condition or "state of things, going to the root of the contract, and essential "to its performance." I can see no valid reason why the right to recover prepaid money should not equally arise on frustration arising from supervening circumstances as it arises on frustration from destruction of a particular subject-matter. The conclusion is that the rule in *Chandler* v. *Webster* (2) is wrong, and that the appellants can recover their 1000*l*.

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(1) 11 East, 210.

While this result obviates the harshness with which the previous view in some instances treated the party who had made a prepayment, it cannot be regarded as dealing fairly between the parties in all cases, and must sometimes have the result of leaving the recipient who has to return the money at a grave disadvantage. He may have incurred expenses in connexion with the partial carrying out of the contract which are equivalent, or more than equivalent, to the money which he prudently stipulated should be prepaid, but which he now has to return for reasons which are no fault of his. He may have to repay the money, though he has executed almost the whole of the contractual work, which will be left on his hands. These results follow from the fact that the English common law does not undertake to apportion a prepaid sum in such circumstances—contrast the provision, now contained in s. 40 of the Partnership Act, 1890, for apportioning a premium if a partnership is prematurely dissolved. It must be for the legislature to decide whether provision should be made for an equitable apportionment of prepaid moneys which have to be returned by the recipient in view of the

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(1) [1903] 2 K. B. 740, 748.

(2) [1904] 1 K. B. 493.

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frustration of the contract in respect of which they were paid. I move that the appeal be allowed, and that judgment be entered for the appellants.

LORD ATKIN. My Lords, for the reasons given by the Lord Chancellor I agree that the appellant fails on all his points except that arising out of the frustration of the contract. I have no doubt that the contract in this case came to an end before the time for complete performance had arrived by reason of the arising of a state of war which caused an indefinite delay not contemplated by the parties, and eventually the legal impossibility of delivering the goods at a port occupied by the enemy. In other words, to use a short phrase of frequent occurrence since the beginning of the last war, the commercial adventure was frustrated. The legal effects of "frustration" are not in dispute. They were not determined for the first time either by the cases which arose on the postponement of the coronation of Edward VII., or by reason of the last war. It is very necessary to remember that, as pointed out by Vaughan Williams L.J. in *Krell* v. *Henry* (1), the principle of law is the same whether the performance of the contract becomes impossible by the cessation of existence of a thing which is the subject of the contract (an obligation de certo corpore) or by the cessation or non-existence of an express condition or state of things going to the root of the contract and essential to its performance, and it is well settled that when a contract which is still executory on one or both sides is subject to frustration the law is that when the event happens the parties are excused from further performance, but have to give effect to rights under the contract already accrued before the happening of the event. A. sells a horse to B. for 50*l.*, delivery to be made in a month, the price to be paid forthwith, but the property not to pass till delivery, and B. to pay A. each week an agreed sum for keep of the horse during the month. The horse dies in a fortnight. A. is excused from delivery and B. from taking delivery. B. is bound to pay the sum due for the fortnight during which the horse was kept. But what is the position as to the 50*l.*, the price paid in advance? This is in simple terms the problem in the present case. The answer that I venture to think would occur to most people, whether laymen or lawyers, would be that the buyer ought to get his money back, having had nothing for it, and the lawyer would support the claim by saying that it is money had and received to the use of the buyer, being money paid on a consideration which has wholly failed.

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(1) [1903] 2 K. B. 740, 748.

But that is not the answer which was given in similar circumstances in the coronation cases, and it is those decisions that come up for review in the present case. The question arose in the neatest form in *Chandler* v. *Webster* (1), where the leading judgment was given in the Court of Appeal by Collins M.R., a master of the common law, whose opinion the profession have always rightly held in the greatest respect. In that case the plaintiff had hired a room to view the coronation procession on Thursday, June 26, 1902. On June 10 he wrote to the defendant: "I beg to confirm my purchase "of the first floor room of the Electric Lighting Board at "7, Pall Mall to view the procession on Thursday, June 26, "for the sum of 141*l.* 15*s.*, which amount is now due. I "shall be obliged if you will take the room on sale, and I "authorize you to sell separate seats in the room, for which "I will erect a stand." It became the subject of controversy whether, in view of certain other terms arranged between the parties, the whole sum became due before the procession became impossible, but the courts decided, as was clearly the case, that it did so become due. It may be noted that the defendant had nothing to do under the contract but allow the plaintiff the use of the room. On June 19 the plaintiff paid the defendant 100*l.* on account of the price of the room, but had not paid the balance at the time the procession was abandoned. The plaintiff claimed the return of the 100*l.* on a total failure of consideration, the defendant counterclaimed for the balance of 41*l.* 15*s.* Collins M.R. (2) dealing with the contention that there had been a total failure of consideration, after stating that it raised a question of some difficulty, stated that the principle on which it has been dealt with is that which was applied in *Taylor* v. *Caldwell* (3), namely, that where the contract has become impossible in the circumstances there stated "it remains a perfectly "good contract up to that point, and everything previously "done in pursuance of it must be treated as rightly done, but "the parties are both discharged from further performance of "it." So far the statement is unassailable. But the Master of the Rolls proceeded: "If the effect were that the contract

(1) [1904] 1 K. B. 493.
(2) Ibid. 499.
(3) 3 B. & S. 826.

"were wiped out altogether, no doubt the result would be that "money paid under it would have to be repaid as on a failure "of consideration. But that is not the effect of the doctrine: "it only releases the parties from further performance of the "contract. *Therefore*" (the italics are mine) "the doctrine "of failure of consideration does not apply." It seems plain that the Master of the Rolls is not repelling the claim for money had and received on the ground that the doctrine as to impossibility of performance itself, as part of its content, excludes the claim. *Taylor* v. *Caldwell* (1), the principle of which he is expressly applying, had nothing to do with money had and received. The claim was for damages in costs of advertisements, etc., for concerts for which the defendants had agreed to let their hall at the Surrey Gardens, a contract which it was impossible to perform because the hall was destroyed by fire after the contract. The Master of the Rolls there is applying the common law rule as to money had and received to a case of a contract where all that had happened was that in law both parties were released from further performance, and in those circumstances he seems to say: "The doctrine of failure of consideration only applies "where the contract is wiped out altogether. In this case "it is not. The parties are only discharged from further "performance. Therefore, the claim for money had and "received must fail."

My Lords, the difficulty which this decision causes me is to understand how this great lawyer came to the conclusion that the claim for money paid on a consideration which wholly failed could only be made where the contract was wiped out altogether, and I have sought for some construction of his words which stopped short of that absolute statement, but I can find none. I know of no authority for the proposition. It is true that where a party is in a position to rescind a contract he may be able to sue for money which he has paid under the contract now rescinded, but there are numerous cases where there has been no question of rescission where such an action has lain. I may refer to *Giles* v. *Edward* (2) where a contract to deliver wood was prevented by the defendant preventing performance by not loading all the wood; *Rugg* v. *Minett* (3), where the buyer had paid part of the purchase price on a sale of turpentine in casks, where the property in some casks had passed while in seller's warehouse, but in some had not, and the purchaser was entitled to recover as money had and received the proportion properly attributable to the casks in which the property had not passed; *Nockels* v. *Crosby* (1); *Wilson* v. *Church* (2); *National Bolivian Navigation Co.* v. *Wilson* (3); *Johnson* v. *Goslett* (4); and *Ashpitel* v. *Sercombe* (5), in all of which the plaintiff had put up money for an adventure which was eventually abandoned by the promoters; *Devaux* v. *Conolly* (6), where there had been an over-payment in respect of goods delivered. In none of these cases was it suggested that the contract was "wiped out "altogether." Indeed, in other cases where it is suggested that the contract was "rescinded," all that is meant is that the party was entitled to treat himself as no longer bound to perform and to recover what he himself has paid. With great respect, therefore, to the judgment in *Chandler* v. *Webster* (7), I do not agree with that part of it which refused to give effect to the plaintiff's claim for return of the sum which he had paid on the ground of total failure of consideration. Some discussion arose as to the precise meaning of this term. It was pointed out that the consideration for the part payment by the appellants was the promise by the respondents to deliver the goods c.i.f. at Gdynia; and the promise was always effective until further performance was excused. I personally agree with that statement of what the consideration was, and I do not think it necessary to use the word "consideration" in two senses. I understand by the phrase that the promise to deliver goods totally failed because no goods were or could be delivered, and that therefore a cause of action accrued to the appellants. I should add that, if it was wrong in *Chandler* v. *Webster* (7) to refuse the plaintiff relief on his claim, it was also wrong to give the defendant judgment on his counterclaim. It is true that the right to receive the balance had accrued before frustration, but if the money had been paid it could have been recovered back as the 100*l*. could, and the principles relating to circuity of action would afford a defence to the counterclaim. Lord Dunedin quotes with approval in the law of Scotland the brocard "frustra "petis quod mox es restiturus," *French Marine* v. *Compagnie*

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(1) 3 B. & S. 826.

(2) (1797) 7 Term Rep. 181.

(3) 11 East, 210.

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(1) (1825) 3 B. & C. 814.
(2) 13 Ch. D. 1.
(3) 5 App. Cas. 176.
(4) 3 C. B. (N. S.) 569.
(5) (1850) 5 Ex. 147.
(6) 8 C. B. 640.
(7) [1904] 1 K. B. 493.

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Napolitaine d'Eclairage et de Chauffage par le Gaz (1), and the expression aptly fits the English law in this respect. It was urged before us that in the case last cited the House of Lords held that *Chandler* v. *Webster* (2) was rightly decided, and that this House is consequently bound to follow it. I cannot agree. The *French Marine* case (3) was a case of a time charter under which hire was paid monthly in advance, and the ship was only redelivered after part of the month had expired. Lord Sumner (4) draws attention to the fact that there was no total failure of consideration, but a partial failure only, for which in law no pro rata repayment could be claimed. It is obvious, therefore, that the present question did not arise, and in *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (5), a case which turned on the Scots law, all their Lordships treated the question of the English law as open in this House. In the case last mentioned it was decided that according to Scots law restitution could be made of sums paid in advance where the contract was frustrated, and it is satisfactory to find that the English and Scots law now agree on this point. It is unnecessary to discuss the interesting suggestion that the Scots law does not in fact entitle the claimant to recover necessarily the whole amount paid, but only so much as can be shown to be an unjust enrichment of the defender—in other words, that the latter may claim an adjustment in respect of the amount by which he is out of pocket for expenses incurred in respect of the contract. There was no decision on this point in the case, though this House affirmed the interlocutor of Lord Hunter, the Lord Ordinary, who had given permission to the defenders to amend their pleas in order, as it appears, to counterclaim for expenses, a proceeding which in any event I do not understand. It may be that such an adjustment was possible under Roman law, but there seems no direct authority for it in Scots law, and there is a dictum of great weight against it in the judgment of Lord President Inglis in *William Watson & Co.* v. *Shankland* (6).

That the result of the law may cause hardship when a contract is automatically stayed during performance and any further right to performance is denied to each party is incontrovertible. One party may have almost completed expensive work. He can get no compensation. The other party may have paid the whole price, and if he has received but a slender part of the consideration he can get no compensation. At present it is plain that if no money has been paid on the contract there is no legal principle by which loss can be made good. What is being now decided is that the application of an old-established principle of the common law does enable a man who has paid money and received nothing for it to recover the money so expended. At any rate, it can be said it leaves the man who has received the money and given nothing for it in no worse position than if he had received none. Many commercial contracts provide for various risks. It is always possible to provide for the risk of frustration, but what provision the parties may agree will probably take some time to negotiate. Meanwhile, by the application of a general doctrine which is independent of the special contract and only comes into play when further performance of the latter is precluded, the man who pays money in advance on a contract which is frustrated and receives nothing for his payment is entitled to recover it back. I think, therefore, that the appeal should be allowed.

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(1) [1921] 2 A. C. 494, 511.
(2) [1904] 1 K. B. 493.
(3) [1921] 2 A. C. 494.
(4) Ibid. 517.
(5) [1924] A. C. 226.
(6) (1871) 10 M. 142, 152.

LORD RUSSELL OF KILLOWEN (read by LORD MACMILLAN). My Lords, that which has been described during the argument of this case, and at other times, as "the rule in *Chandler* v. "*Webster*" (1) should, I think, rather be called the rule (to put it shortly) that in cases of frustration loss lies where it falls, or (at greater length) that where a contract is discharged by reason of supervening impossibility of performance payments previously made and legal rights previously accrued according to the terms of the contract will not be disturbed, but the parties will be excused from liability further to perform the contract. I say this because, as I read the judgment of the Master of the Rolls in *Chandler* v. *Webster* (1), he does not purport to be framing any new rule, or laying down any new law. He thought that the case which he was deciding was one which, on its facts, was governed by a rule already established by the authorities. In Scotland the consequence of frustration is not that loss lies where it falls. The Scots law derives from the Roman law a different view, founded on the doctrine of restitutio, which has no place in English law, and which it is not open to us to import into the law of England. We must examine the rule as it exists in the law of England, and

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determine whether the appellants are entitled to be repaid the 1000*l.* If *Chandler* v. *Webster* (1) was rightly decided, they would clearly not be so entitled.

It is to be observed that the doubt as to the correctness of the rule only arises in cases in which one of the parties to the contract has paid over to the other party the whole or part of the money payable by him as the consideration for what he is to receive as the consideration moving from the other party. If no such money has been paid the rule must apply, for I know no principle of English law which would enable either party to a contract which has been frustrated to receive from the other compensation for any expense, or indemnity from any liability, already incurred in performing the contract. Nor could moneys paid before frustration be recovered if the person making the payment has received some part of the consideration moving from the other party for which the payment was made. In such a case the rule would still apply.

But I am of opinion that this appeal should succeed because of another aspect of the matter. In the present case the appellants, before frustration, paid in advance a part of the price of the machines. We heard an elaborate argument as to what was the exact consideration moving from the respondents for that part of the contract which stipulated for payment of part of the price in advance. I am not aware of any justification for splitting up the consideration in this way, and assigning a consideration for each separate provision of a contract. Under the contract here in question the consideration moving from the respondents was either the delivery of the machines at Gdynia, or the promise to deliver the machines at Gdynia. I think that the delivery was the consideration, but in whichever way the consideration is viewed, it is clear that no part of the consideration for which part of the price of the machines was paid ever reached the appellants. There was a total failure of the consideration for which the money was paid. In those circumstances, why should the appellants not be entitled to recover back the money paid, as money had and received to their use, on the ground that it was paid for a consideration which has wholly failed? I can see no reason why the ordinary law, applicable in such a case, should not apply. In such a case the person who made the payment is entitled to recover the money

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paid. That is a right which in no way depends upon the continued existence of the frustrated contract. It arises from the fact that the impossibility of performance has caused a total failure of the consideration for which the money was paid. In his judgment in *Chandler* v. *Webster* (1) the Master of the Rolls states that the right to recover moneys paid for a consideration which has failed only arises where the contract is "wiped out altogether," by which expression I understand him to mean is void ab initio. This is clearly a misapprehension on the part of the learned judge. The money was recoverable under the common indebitatus count, as money received for the use of the plaintiff. The right so to recover money paid for a consideration that had failed did not depend on the contract being void ab initio. There are many such cases in the books in which the contract has not been void ab initio, but the money paid for a consideration which has failed has been held recoverable. Thus, as one example, money paid as a deposit on a contract of sale which has been defeated by the fulfilment of a condition is recoverable: *Wright* v. *Newton* (2). It was submitted by the respondents, but without argument, that money paid for a consideration which had failed was recoverable only when the failure was due to the fault of the other party to the contract, but, on the authorities, this submission is clearly ill-founded. *Chandler* v. *Webster* (1) was, accordingly, in my opinion, wrongly decided. The money paid was recoverable, as having been paid for a consideration which had failed. The rule that on frustration the loss lies where it falls cannot apply in respect of moneys paid in advance when the consideration moving from the payee for the payment has wholly failed, so as to deprive the payer of his right to recover moneys so paid as moneys received to his use, but, as I understand the grounds on which we are prepared to allow this appeal, the rule will (unless altered by legislation) apply in all other respects.

LORD MACMILLAN. My Lords, speaking in 1923 of the so-called "coronation cases" Lord Shaw ventured on prophecy. "No doubt," he said, "the occasion will arise "when that chapter of the law will have to be considered in "this House," for, as the Earl of Birkenhead had pointedly observed, "none of them" [the "coronation cases"] "is "binding upon your Lordships": *Cantiare San Rocco S.A.*

(1) [1904] 1 K. B. 493. (2) (1835) 2 C. M. & R. 124.

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v. *Clyde Shipbuilding and Engineering Co.* (1). The mills of the law grind slowly. Thirty-eight years have elapsed since the Court of Appeal pronounced judgment in *Chandler* v. *Webster* (2), and nineteen years have passed since Lord Shaw used the words which I have quoted, but now at length in the present appeal the occasion foretold has arisen, and I may be permitted to express my gratification that it has been employed to clear the law of England by the unanimous judgment which the House is to-day pronouncing from the reproach to which it was exposed so long as the law laid down in *Chandler* v. *Webster* (2) held the field.

My Lords, every system of law has had to face the problem of defining the consequences of a contract becoming impossible of fulfilment owing to some external supervening event for which neither of the parties is responsible. That such an eventuality releases both parties from further performance of any of the stipulations of the contract is agreed on all hands. Each must fulfil his contractual obligations up to the moment when impossibility supervenes, for the contract is not avoided by becoming impossible of fulfilment, but the duty of further performance ceases. Having so declared, must the law stop there? What if money has been paid, work has been done, or liabilities have been incurred by one or other or both of the parties in pursuance of or in reliance on the fulfilment of the contract which now can never be completed? The law may say that the event which has rendered fulfilment of the contract impossible is, so far as the parties are concerned, a mere accident, that of mere accident the law takes no cognizance and for its consequences affords no redress, and that loss or gain must lie where it happens to fall and the parties must be left where they stood when their contract was frustrated. On the other hand, the law may endeavour to effect an equitable adjustment between the parties so as to restore each as far as may be to the position which he occupied before he entered into the contract and by a process of give and take to mitigate the consequences of the contract having proved abortive. I find this doctrine of restitution stated in its broadest terms in Pufendorf's celebrated treatise on the Law of Nature and Nations, first published in 1672, as follows: " When the thing at the time of making the "promise or pact appeared possible and afterwards becomes "impossible, we must enquire whether this happened by

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(1) [1924] A. C. 226, 233, 257, 258. (2) [1904] 1 K. B. 493.

"mere (meer) chance, or by default and deceit. In the former "case the pact is disannulled, if nothing has yet been performed "on either side. If anything have been already done, towards "it by one of the parties, the other shall give it back, or pay "to the value of it; if neither of these can be done he is to use "his best endeavours, that the man be not a loser by him. For "in contracts, the first regard is had to the thing expressly "mentioned in the agreement; when this cannot be obtained, it "is sufficient to give an equivalent; but whatever happens, all "imaginable care is to be used, that the other party suffer no "prejudice." (Bk. III., ch. 7, s. 3. English Translation, Oxford, 1703, p. 225.) It is obvious that neither of these attempted solutions of the difficulty can be productive of complete justice. To leave matters as they stood when the contract became impossible of fulfilment may result in great gain to one of the parties and great loss to the other and to a grave infringement of the maxim nemo debet locupletari aliena jactura. It is no consolation to the individual sufferer to be told that on the whole such a rule works less injustice than any other. It is, in truth, a confession of impotence in the face of a problem deemed to be inextricable. On the other hand, to attempt to restore matters in their entirety is to attempt the impossible. The hands of the clock cannot be turned back. Things cannot be as if they had not been. At best some sort of equitable accommodation can be achieved which must inevitably fall short of complete justice. The process is sought to be rationalized on a theory of quasi-contract. The parties have made no provision in their contract for the event which has frustrated it, so the law implies for them what it assumes they would have agreed on if they had had the unforeseen contingency in contemplation when they entered into their contract. On another view, restitution is regarded as a separate principle of the law independent of contract.

Presented with this choice of methods of dealing with the situation, the law of England has adopted as its general principle the first of the two alternatives, namely, that each party shall be left as he stood, despairing of the practicability of conjecturing and enforcing what the parties might be assumed to have agreed on if they had contemplated and provided for the unforeseen contingency. The law of Scotland, on the other hand, following in this respect the Roman law, has accepted the principle of restitution, though how far it has

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gone in doing so and with what qualifications it would be out of place for me to discuss here. It may suffice to refer to the speeches of Lord Dunedin and Lord Shaw in the *Cantiare San Rocco* case (1). But the law of England has characteristically mitigated the rigour of its doctrine in one instance, namely, where in pursuance of a contract money has been paid by one party to the other for a consideration which has completely failed. The right of a plaintiff to recover, under the common indebitatus count for money received, any sum which he has paid for a consideration which has wholly failed has long been fully recognized in the common law of England: see Bullen and Leake's Precedents of Pleading, 3rd ed., 1868, pp. 44 et seq. My noble and learned friends whose opinions I have had the privilege of reading in advance have by ample citations fully vouched the law on the subject and the task is more fittingly discharged by them than by me.

How, then, if such be the law of England did *Chandler* v. *Webster* (2) come to be decided as it was, for there never was a clearer case of money paid for a consideration which had entirely failed? The explanation is to be found in the passage in the judgment of Collins M.R. (3), where he said that the doctrine of failure of consideration applies only where a contract is "wiped out altogether" or, as Romer L.J. put it (4) "rescinded ab initio," and does not apply where the parties are merely released from further performance. I can only say, with all respect, that this is a complete misapprehension. There is no authority for such a distinction and there is ample authority to prove that it does not exist. It has no basis in principle or precedent. So *Chandler* v. *Webster* (4) and its congeners must be consigned to the limbo of cases disapproved and overruled. They will be unwept save by those to whom for so many years they have furnished a fruitful and enlivening topic of discussion in lecture rooms and periodicals. Your Lordships being of one mind that the so-called rule in *Chandler* v. *Webster* (4) is unsound, the way lies clear for the decision of the present case. The appellants made a payment to the respondents on account of the price of certain plant which the respondents were to manufacture and deliver to them. Owing to circumstances arising out of the present hostilities the contract has become impossible of fulfilment according to its terms. Neither party is to blame.

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(1) [1924] A. C. 226.
(2) [1904] 1 K. B. 493.
(3) Ibid. 499.
(4) Ibid. 501.

In return for their money the appellants have received nothing whatever from the respondents by way of fulfilment of any part of the contract. It is thus a typical case of a total failure of consideration. The money paid must be repaid. I am, accordingly, in favour of allowing the appeal.

LORD WRIGHT. My Lords, the claim in the action was to recover a prepayment of 1000*l.* made on account of the price under a contract which had been frustrated. The claim was for money paid for a consideration which had failed. It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution. The root idea was stated by three Lords of Appeal, Lord Shaw, Lord Sumner and Lord Carson, in *R. E. Jones, Ld.* v. *Waring & Gillow, Ld.* (1), which dealt with a particular species of the category, namely, money paid under a mistake of fact. Lord Sumner referring to *Kelly* v. *Solari* (2), where money had been paid by an insurance company under the mistaken impression that it was due to an executrix under a policy which had in fact been cancelled, said: "There was no real intention on "the company's part to enrich her." Payment under a mistake of fact is only one head of this category of the law. Another class is where, as in this case, there is prepayment on account of money to be paid as consideration for the performance of a contract which in the event becomes abortive and is not performed, so that the money never becomes due. There was in such circumstances no intention to enrich the payee. This is the class of claims for the recovery of money paid for a consideration which has failed. Such causes of action have long been familiar and were assumed to be common-place by Holt C.J. in *Holmes* v. *Hall* (3) in 1704. Holt C.J. was there concerned only about the proper form of action and took the cause of the action as beyond question. He said: "If A "give money to B to pay to C upon C's giving writings, etc.,

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(1) [1926] A. C. 670, 696.

(2) (1841) 9 M. & W. 54.

(3) (1704) Holt 36.

"and C will not do it, indebit will lie for A against B for so "much money received to his use. And many such actions "have been maintained for earnests in bargains, when the "bargainor would not perform, and for premiums for insurance, "when the ship, etc., did not go the voyage." The Chief Justice is there using earnest as meaning a prepayment on account of the price, not in the modern sense of an irrevocable payment to bind the bargain, and he is recognizing that the indebitatus assumpsit had by that time been accepted as the appropriate form of action in place of the procedure which had been used in earlier times to enforce these claims such as debt, account or case.

By 1760 actions for money had and received had increased in number and variety. Lord Mansfield C.J., in a familiar passage in *Moses* v. *Macferlan* (1), sought to rationalize the action for money had and received, and illustrated it by some typical instances. "It lies," he said, "for money paid by mistake; "or upon a consideration which happens to fail; or for money "got through imposition (express, or implied;) or extortion; "or oppression; or an undue advantage taken of the plaintiff's "situation, contrary to laws made for the protection of persons "under those circumstances. In one word, the gist of this "kind of action is, that the defendant, upon the circumstances "of the case, is obliged by the ties of natural justice and equity "to refund the money." Lord Mansfield prefaced this pronouncement by observations (2) which are to be noted. "If "the defendant be under an obligation from the ties of natural "justice, to refund; the law implies a debt and gives this action "[sc. indebitatus assumpsit] founded in the equity of the "plaintiff's case, as it were, upon a contract (' quasi ex con-"' tractu ' as the Roman law expresses it)." Lord Mansfield does not say that the law implies a promise. The law implies a debt or obligation which is a different thing. In fact, he denies that there is a contract; the obligation is as efficacious as if it were upon a contract. The obligation is a creation of the law, just as much as an obligation in tort. The obligation belongs to a third class, distinct from either contract or tort, though it resembles contract rather than tort. This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. There is, for

(1) (1760) 2 Burr. 1005, 1012.

(2) 2 Burr. 1005, 1008.

instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it.

The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost. This is important because some confusion seems to have arisen though perhaps only in recent times when the true nature of the forms of action have become obscured by want of user. If I may borrow from another context the elegant phrase of Viscount Simon L.C. in *United Australia, Ld.* v. *Barclays Bank, Ld.* (1), there has sometimes been, as it seems to me, "a misreading of technical rules, "now happily swept away." The writ of indebitatus assumpsit involved at least two averments, the debt or obligation and the assumpsit. The former was the basis of the claim and was the real cause of action. The latter was merely fictitious and could not be traversed, but was necessary to enable the convenient and liberal form of action to be used in such cases. This fictitious assumpsit or promise was wiped out by the Common Law Procedure Act, 1852. As Bullen and Leake (Precedents of Pleading, 3rd ed., p. 36) points out, this Act, by s. 3, provided that the plaintiff was no longer required to specify the particular form of action in which he sued, and by s. 49 that (inter alia) the statement of promises in indebitatus counts which there was no need to prove were to be omitted; "the action of indebitatus assumpsit," the authors add, "is "[that is by 1868] virtually become obsolete." Lord Atkin in the *United Australia* case (2), after instancing the case of the blackmailer, says: "The man has my money which I have not "delivered to him with any real intention of passing to him the "property. I sue him because he has the actual property "taken." He adds: "These fantastic resemblances of con-"tracts invented in order to meet requirements of the law as to "forms of action which have now disappeared should not in "these days be allowed to affect actual rights." Yet the ghosts of the forms of action have been allowed at times to intrude in the ways of the living and impede vital functions of the law. Thus in *Sinclair* v. *Brougham* (1), Lord Sumner stated that "all these causes of action [sc. for money had and "received] are common species of the genus assumpsit. All "now rest, and long have rested, upon a notional or imputed "promise to repay." This observation, which was not necessary for the decision of the case, obviously does not mean that there is an actual promise of the party. The phrase "notional or implied promise" is only a way of describing a debt or obligation arising by construction of law. The claim for money had and received always rested on a debt or obligation which the law implied or more accurately imposed, whether the procedure actually in vogue at any time was debt or account or case or indebitatus assumpsit. Even the fictitious assumpsit disappeared after the Act of 1852. I prefer Lord Sumner's explanation of the cause of action in *Jones's* case (2). This agrees with the words of Lord Atkin which I have just quoted, yet serious legal writers have seemed to say that these words of the great judge in *Sinclair* v. *Brougham* (1) closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a reductio ad absurdum of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair* v. *Brougham* (1).

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(1) [1941] A. C. 1, 21.

(2) [1941] A. C. 1, 29.

Must, then, the court stay its hand in what would otherwise appear to be an ordinary case for the repayment of money paid in advance on account of the purchase price under a contract for the sale of goods merely because the contract has become impossible of performance and the consideration has failed for that reason? The defendant has the plaintiff's money. There was no intention to enrich him in the events which happened. No doubt, when money is paid under a contract it can only be claimed back as for failure of consideration where the contract is terminated as to the future. Characteristic instances are where it is dissolved by frustration or impossibility or by the contract becoming abortive for any reason not involving fault on the part of the plaintiff where the consideration, if entire, has entirely

(1) [1914] A. C. 398, 452.

(2) [1926] A. C. 670, 696.

failed, or where, if it is severable, it has entirely failed as to the severable residue, as in *Rugg* v. *Minett* (1). The claim for repayment is not based on the contract which is dissolved on the frustration but on the fact that the defendant has received the money and has on the events which have supervened no right to keep it. The same event which automatically renders performance of the consideration for the payment impossible, not only terminates the contract as to the future, but terminates the right of the payee to retain the money which he has received only on the terms of the contract performance. In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (2), Lord Sumner who has done so much in his judgments to elucidate the meaning and effect of frustration, contrasts rescission of a contract by one party on the ground of breach by the other party, which depends on election by the former, with frustration, which operates automatically apart from either party's election. He finds, however, a similarity in the respect that rights and wrongs which have come already into existence remain, though the contract is ended as regards obligations de futuro. But the contract is in neither case wiped out, or avoided ab initio. The right in such a case to claim repayment of money paid in advance must in principle, in my judgment, attach at the moment of dissolution. The payment was originally conditional. The condition of retaining it is eventual performance. Accordingly, when that condition fails, the right to retain the money must simultaneously fail. It is not like a claim for damages for breach of the contract which would generally differ in measure and amount, nor is it a claim under the contract. It is in theory and is expressed to be a claim to recover money, received to the use of the plaintiff. This, I think, was the view of Lord Haldane L.C. speaking for the Judicial Committee in *Royal Bank of Canada* v. *Reg.* (3). He said : "It is a well-established "principle of the English common law that when money "has been received by one person which in justice and equity "belongs to another, under circumstances which render the "receipt of it a receipt by the defendant to the use of the "plaintiff, the latter may recover as for money had and "received to his use." The principle extends to cases where the money has been paid for a consideration which has failed. It applies, as was pointed out by Brett L.J. in *Wilson* v.

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(1) 11 East, 210.
(2) [1926] A. C. 497, 510.
(3) [1913] A. C. 283, 296.

Church (1), when money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect subsequently to the payment and which has become abortive. The lender has in this case a right to claim the return of the money in the hands of the borrowers as being held to his use. This language of Brett L.J. was used in connexion with the failure of a scheme for the development of a concession in Bolivia which the Bolivian government revoked, thus rendering the fulfilment of the scheme impossible. The House of Lords affirmed the judgment of a strong Court of Appeal, and held that the borrowers were entitled to repayment of their loan on the ground that the consideration for the loan had failed: *National Bolivian Navigation Co.* v. *Wilson*, in particular per Lord Cairns L.C. (2). Some years earlier a decision, not dissimilar in principle, was reached in 1850, in *Ashpitel* v. *Sercombe* (3). The plaintiff had paid a deposit on this application for shares in a projected railway company, but the scheme had to be abandoned for want of sufficient subscriptions. The appeal was heard before Patteson, Coleridge, Maule, Cresswell, Wightman, Erle and Williams JJ., all masters of the common law. The plaintiff's claim for return of the deposit was upheld. Patteson J., delivering the judgment of the court, said (4): "This was an action "for money had and received, brought by the plaintiff, an "allottee of shares in a proposed railway company, which "had been abandoned before the commencement of the "action, without any fraud or misconduct, against the "defendant, one of the managing committee, to recover back "the plaintiff's deposit. . . . There seems to be no doubt that "the plaintiff having paid his money for shares in a concern "which never came into existence, or a scheme which was "abandoned before it was carried into execution, has paid it "on a consideration which has failed, and may recover it "back as money had and received to his use." It was further held that the defendant could not deduct money which the directors had expended towards carrying out the scheme, unless it could be shown that the plaintiff had consented to or acquiesced in the application of his money. The books contain other cases of a similar character, such as *Johnson* v. *Goslett* (5). These cases were merely special instances where performance having become impossible, the payers were held entitled to recover what they had paid, the contract having come to an end between the time when the money was paid and the date at which the contract was to be performed. Similar claims have been made for recovery of deposits paid. Such a claim has succeeded even under a contract by deed for the purchase of an estate. Thus, in *Greville* v. *Da Costa* (1), the vendor was disabled from selling by an order of the Lord Chancellor. Lord Kenyon C.J. said that he held the purchase money against conscience, and, therefore, might be compelled to repay it by an action for money had and received. It is clear that the failure of consideration need not be attributable to breach of contract or misconduct on the part of the defendant, as the cases I have cited and many others show. Impossibility of performance or frustration is only a particular type of circumstance in which a party who is disabled from performing his contract is entitled to say that the contract is terminated as to the future, and in which repayment of money paid on account of performance may be demanded.

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(1) 13 Ch. D. 1, 49.
(2) 5 App. Cas. 176, 185.
(3) 5 Ex. 147.
(4) 5 Ex. 161, 162.
(5) 3 C. B. (N. S.) 569.

These principles, however, only apply where the payment is not of such a character that by the express or implied terms of the contract it is irrecoverable even though the consideration fails. The contract may exclude the repayment. An illustration of this is afforded by advance freight which by English law is not recoverable if the delivery of the goods is prevented by the act of God, perils of the seas or other excepted cause which excludes an action of damages. In *Allison* v. *Bristol Marine Insurance Co.* (2), Lord Selborne stated it to be "the "peculiar rule of English mercantile law, that an advance on "account of freight to be earned . . . . is, in the absence of any "stipulation to the contrary, an irrevocable payment at the "risk of the shipper of the goods." So, indeed, the law had been laid down by Saunders C.J. in *Anon.* (Case 271) (3) in 1682 and has remained ever since. I may also refer to *Byrne* v. *Schiller* (4). The irrecoverable nature of the payment is there determined by custom or law, unless the contract provides for the contrary. In other cases likewise a particular contract may effectively make a prepayment irrecoverable. In the present case the payment is not made irrecoverable by any custom or rule of law, or by any express or implied terms of the contract. It was paid on account of the price. It was not

(1) (1797) Peake Add. Cas. 113.
(2) (1875) 1 App. Cas. 209, 253.
(3) (1683) 2 Shower 283.
(4) L. R. 6 Ex. 319.

paid out-and-out for the signing of the contract. When the sellers were disabled to perform the contract by the shipment to Gdynia becoming illegal, the ordinary rules of law and the authorities to which I have referred show that the sum of 1000*l.* paid in advance of the price was recoverable by the appellants in the present action.

The court below have held themselves bound to reach the contrary decision only on the authority of certain cases, generally known as the "coronation cases," in particular *Blakeley* v. *Muller & Co.* (1), reported in a note to *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (2), and *Chandler* v. *Webster* (3). These cases dealt with agreements for the hiring of rooms from which to view the procession on the coronation of King Edward VII. It had been held in *Krell* v. *Henry* (4), that the mere use of the rooms on the appointed day was only part of the consideration for the agreed payment, and that an essential part of the consideration was the opportunity of viewing the procession. That was the object or basis of the contract in contemplation of both parties. When the procession could not take place, the contract, it was held, became abortive or was frustrated. There was no decision in that case on whether money paid in advance was recoverable. In *Blakeley* v. *Muller & Co.* (1) the prepayment had fallen due before the frustration supervened. A Divisional Court held that the hirer, who had paid in advance, could not recover back the money. They did not discuss the principles or authorities to which I have referred on the right to recover money paid for a consideration which has failed. I take the ratio decidendi from the judgment of Channell J., because in the next case of that type, the *Civil Service Co-operative Society* case (2), Lord Halsbury L.C., sitting in the Court of Appeal, quoted a long passage from it and added that he concurred with every word of it. The reasoning of Channell J., as I understand his judgment, was that the loss must remain where it was at the time of the abandonment, because it was impossible to import into a contract a condition which the parties might have imported but had not, and that under *Taylor* v. *Caldwell* (5) and *Appleby* v. *Myers* (6) (cases of impossibility), all that was said was that the parties were excused from further performance, not that anything that was done under the contract was void. In the former case, the claim was for damages, in the latter it was on a quantum meruit for partial performance of an entire consideration. Each claim failed. Neither was a claim for money had and received. Channell J. instanced the case of advance freight under the charterparty. I have already explained that rule, which in Lord Selborne's view is peculiar. I have also explained my view that the right to repayment of advance payments as money had and received to the plaintiff's use is not a claim under the contract or for further performance of the contract or for damages, but a claim outside the contract. The ground of the claim is that the contract has been dissolved as to future performance and hence that the consideration has failed. The Court of Appeal, however, dismissed the claim for the money, following *Blakeley* v. *Muller & Co.* (1). When shortly afterwards the same question on similar facts again came before a differently constituted Court of Appeal, in *Chandler* v. *Webster* (2), Collins M.R. discussed the matter more elaborately, but he still ignored the principles and authorities on the action for money had and received to which I have referred, though the claim was to recover as on a total failure of consideration. He indeed discussed the case from that point of view. The hirer was claiming to recover what he had paid in advance and was resisting a counterclaim for the balance which was by the contract payable before the date when the procession became impossible. He ought, in my opinion, to have succeeded on both issues, but by the judgment of the Court of Appeal he failed on both. The reasoning of the Master of the Rolls may, I think, fairly be summarized to be that impossibility through the fault of neither party leaves the parties where they were but relieves them from further performance, and that it is only if the contract is wiped out altogether that money paid under it would have to be repaid as on a failure of consideration, but that the only effect of impossibility is to release the parties from further performance. The rule, he said, is arbitrary, but it is really impossible to work or adjust with any exactitude what the rights of the parties in the event should be. I hesitate to criticize the ruling of so great a lawyer as the Master of the Rolls, but I cannot concur in these propositions. I need scarcely repeat my reasons for doing so, which are apparent from what I have already said. The claim for money had and received is not, in my opinion, a claim for further performance of the contract. It is a claim outside the contract. If the parties are left where they are, one feature of the position is that the one who has received the prepayment is left in possession of a sum of money which belongs to the other. The frustration does not change the property in the money, nor is the contract wiped out altogether, but only the future performance. I may add that the difficulty emphasized by the Master of the Rolls that such a claim involves constructing a hypothetical contract by supposing what terms the parties would have arrived at if they contemplated the future impossibility does not arise, but I do not think that this way of envisaging the matter accords with the true position. In my opinion, the contract is automatically terminated as to the future because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party. When the court holds a contract to be thus terminated, it is simply giving appropriate effect to the circumstances of the case, including the actual contract and its meaning applied to the event. It is this view which is involved in Lord Sumner's phrase in *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (1). "It" [sc. the doctrine of frustration] "is really a device, by which the rules as to "absolute contracts are reconciled with a special exception "which justice demands." He combined with this a reference to what has been generally accepted by English law, that the rule is explained in theory as a condition or term of the contract implied by the law ab initio. No one who reads the reported cases can ignore how inveterate is this theory or explanation in English law. I do not see any objection to this mode of expression so long as it is understood that what is implied is what the court thinks the parties ought to have agreed on the basis of what is fair and reasonable, not what as individuals they would or might have agreed. "It is," said Lord Sumner (1), "irrespective of the individuals con-"cerned, their temperaments and failings, their interest and "circumstances." The court is thus taken to assume the rôle of the reasonable man, and decides what the reasonable man would regard as just on the facts of the case. The hypothetical "reasonable man" is personified by the court itself. It is the court which decides. The position is thus somewhat like the position in the cases in which the court

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(1) [1903] 2 K. B. 760*n*.
(2) [1903] 2 K. B. 756.
(3) [1904] 1 K. B. 493.
(4) [1903] 2 K. B. 740.
(5) 3 B. & S. 826.
(6) L. R. 2 C. P. 651.

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(1) [1903] 2 K. B. 760*n*.
(2) [1904] 1 K. B. 493, 499.

(1) [1926] A. C. 497, 510.

imports a term in a contract on the basis of what is reasonable. As frustration is automatic, so equally the claim for money had and received here follows automatically.

Chandler v. *Webster* (1) has bound subsequent Courts of Appeal. Mr. Holmes has contended that it was accepted by this House as good law in the *French Marine* case (2), and was not open to review by your Lordships. The most obvious and shortest answer to that argument is that in *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (3), Lord Birkenhead observed of *Chandler* v. *Webster* (1) that none of the relevant authorities on the law of England on this question was binding on the House. Lord Atkinson agreed and Lord Shaw indicated that the question of English law was open in this House. The *French Marine* case (2) related to freight under a voyage charter payable on a time basis, and the decision may, therefore, have been affected by the English rule as to advance freight, because it was a claim for repayment of time freight paid in advance for days subsequent to the requisition of the ship which rendered her further use by the charterers impossible. Their Lordships were divided in opinion, and it is not clear that there was any real agreement among the majority as to the ratio decidendi. I think the essential ground taken was that the contract provided for certain events in which freight was to cease, but not for the particular event in which the contract terminated, but it was also treated as a case of a partial failure of consideration. The decision reached in *Chandler* v. *Webster* (1) is criticized by Williston on Contracts: s. 1954, p. 5477: see, too, s. 1974, p. 5544, and has not been followed in most of the States of America. Nor is it adopted in the Restatement of the Law of Contract by the American Law Institute, s. 468, pp. 884, et seq. Indeed, the law of the United States seems to go beyond the mere remedy of claims for money had and received and allow the recovery of the value of the benefit of any part performance rendered while performance was possible. Such and similar claims should be recognized in any complete system of law, but it is not clear how far they have been admitted in English law. The Scots law upheld in the *Cantiare* case (3) may seem to be generally like the English law and to be limited to recovery of money payments. The opinion which I have been stating perhaps brings the two laws into substantial accord, though

(1) [1904] 1 K. B. 493.
(2) [1921] 2 A. C. 494.
(3) [1924] A. C. 226, 233.

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in the passage quoted by Lord Birkenhead in the *Cantiare* case (1) from Lord President Inglis's judgment in *William Watson & Co.* v. *Shankland* (2), that judge seems to accept that the payer who had paid in advance should give credit to the extent that he is lucratus by any part performance. I do not wish to discuss how far, if at all, this is open in English law. That was a case of advance freight, which Scots law treats as a prepayment on account, but I think it is clear both in English and Scots law that the failure of consideration which justifies repayment is a failure in the contract performance. What is meant is not consideration in the sense in which the word is used when it is said that in executory contracts the promise of one party is consideration for the promise of the other. No doubt, in some cases the recipient of the payment may be exposed to hardship if he has to return the money though before the frustration he has incurred the bulk of the expense and is then left with things on his hands which become valueless to him when the contract fails, so that he gets nothing and has to return the prepayment. These and many other difficulties show that the English rule of recovering payment the consideration for which has failed works a rough justice. It was adopted in more primitive times and was based on the simple theory that a man who has paid in advance for something which he has never got ought to have his money back. It is further imperfect because it depends on an entire consideration and a total failure. Courts of equity have evolved a fairer method of apportioning an entire consideration in cases where a premium has been paid for a partnership which has been ended before its time: Partnership Act, s. 40; contrary to the common law rule laid down in *Whincup* v. *Hughes* (3). Some day the legislature may intervene to remedy these defects.

I ought to notice, in order to reject, an argument of Mr. Holmes that the House should not reverse or depart from a doctrine which has stood since 1904 and has been followed in several cases by the Court of Appeal and acted upon on practical affairs. The doctrine, however, has been severely criticized by writers both in this country and elsewhere and has been treated as open to review by this House as recently as 1923 in the *Cantiare* case (1). If the doctrine is, as I think it clearly is, wrong and unjust, it is the duty of this House,

(1) [1924] A. C. 226.

(2) 10 M. 142, 152.

(3) L. R. 6 C. P. 78.

exercising its function of finally declaring the law, to reverse it, unless there are very special circumstances such as were recently considered in *Admiralty Commissioners* v. *Valverda (Owners)* (1). On the other hand, in *Lissenden* v. *C. A. V. Bosch, Ld.* (2), the House has recently overruled a decision which had been acted on in frequent practice for 27 years. I may in conclusion add a reference to a very learned article by Professor Buckland, in Harvard Law Review, vol. xlvi., p. 1281. He concludes by observing that, whatever the merits or demerits of *Chandler* v. *Webster* (3) and other cases which he considers in that article, the Roman law cannot be made responsible for the rules laid down in them. In my judgment the appeal should be allowed.

Lord Roche. My Lords, I also am of opinion that this appeal should be allowed and that judgment should be entered for the appellants for the amount of their claim in the action.

I have no doubt that this case is one of frustration of the contract and falls within the doctrine applicable to such cases. An alternative case made by the appellants that the contract was merely suspended and while suspended was repudiated by the respondents is, I think, without foundation. The claim of the appellants, therefore, must be and is a claim to recover the 1000*l.* in dispute as money had and received to their use as paid on a consideration which has wholly failed. The courts below have held themselves bound by authority to decide against this claim. The principal authority for the supposed binding rule of law is *Chandler* v. *Webster* (3) which, it is contended, lays down the rule that on the occurrence of an event which frustrates the performance of the contract the loss lies where it falls and that money paid by one party to the contract to the other party is to be retained by the party in whose hands it is. Taken in their broad and natural sense, the much criticized sentences in the judgment of Collins M.R. in *Chandler* v. *Webster* (4) ending " therefore the doctrine "of failure of consideration does not apply " certainly support a conclusion in favour of the rule contended for. Taken in that sense the proposition is, in my judgment, erroneous in law and unsupported by any authority binding on this House. It is, however, not unimportant to observe the context in which the criticized sentences occur. The learned Master of

(1) [1938] A. C. 173.
(2) [1940] A. C. 412.
(3) [1904] 1 K. B. 493.
(4) Ibid. 499.

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the Rolls was contrasting the case of contracts avoided ab initio where the courts of England have power to decree restitution and the case of contracts frustrated but nevertheless subsisting up to the moment of frustration. In the latter case it is, I think, true that the law of England, differing in this respect from the civil law and the law of Scotland, does not provide for the exercise of any power by the courts to decree restitution or repetition on similar or analogous lines to those exercised where contracts are avoided ab initio: see *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (1). It is to be observed that, while the law of England was not directly in question in that case, Lord Birkenhead stated in express terms that the "coronation cases" were open to review in this House and were not binding on your Lordships.

The question, therefore, is whether, although the courts of England have not, as was rightly held in *Chandler* v. *Webster* (2), a power to decree restitution in the sense above discussed, the matter is concluded against the appellants. The case made by the appellants is that no such doctrine of restitution is necessary to entitle them to succeed in this action. They contend that they are entitled to be repaid their money because of the operation of ordinary and accepted rules of law applicable on a total failure of consideration. In my opinion, that contention is right. The true rule, I think, is that in cases of frustration the loss does lie where it falls, but that this means where it falls having regard to the terms of the contract between the parties. If under a contract payments have been made which have been variously described as absolute or final or out-and-out payments, then they are not recoverable by the party who made them. Payments of freight in advance are payments of this nature. Whatever the origin of the rule as to advance freight, under decisions now centuries old and long acted on in commerce the rule itself that such payments of freight are final and irrecoverable payments is beyond question. In *French Marine* v. *Compagnie Napolitaine* (3) the majority judgments in this House applied the same rule to a payment of hire under a time charterparty by reason of the terms of the charterparty itself: see per Lord Dunedin (4) and per Lord Sumner (5). It is, I think,

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(1) [1924] A. C. 226.
(2) [1904] 1 K. B. 493.
(3) [1921] 2 A. C. 494, 513, 519.
(4) Ibid. 513.
(5) Ibid. 519.

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not unimportant to observe that in *Chandler* v. *Webster* (1) Mathew L.J. based his judgment on this ground of finality in the payment, and I am disposed to think that the Master of the Rolls (2) is presenting a similar view of the facts and I am the more disposed so to think because he, for one of the judges concerned, was a supreme master of the common law, and unlikely on another view of the facts to have expressed himself as he did. Similar views on the facts are expressed in others of the "coronation cases" by some of the judges: see *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co., Ld.* (3), where the payments in question were said to be comparable to payments of freight in advance. It is, in my judgment, unnecessary and unfruitful to consider whether, on this ground, those cases were or were not rightly decided on the facts and documents in question, but if the payments under discussion were properly to be regarded as final or out-and-out payments, then in my judgment the conclusion properly followed that they were not recoverable. It is not possible to say of such payments that the consideration for their payment has wholly failed.

The converse case remains to be considered. It is, I think, a well settled rule of English law that, subject always to special provisions in a contract, payments on account of a purchase price are recoverable if the consideration for which that price is being paid wholly fails: see *Ockenden* v. *Henly* (4). Looking at the terms of the contract in the case now under consideration, I cannot doubt that the sum sued for was of this provisional nature. It was a part of a lump sum price, and when it was paid it was no more than a payment on account of the price. Its payment had advantages for the respondents in affording some security that the appellants would implement their contract and take up the documents and pay the balance of the price, and it may be that it had other advantages in providing finance for the manufacture of the machines. But if no machines or documents of title were delivered to the appellants, as was the actual case, then, in my opinion, the consideration for the price, including the payment on account, wholly failed and the payment so made is recoverable. It was contended by the respondents' counsel that unless there is to be found some default on the part of the recipient of such a payment as is now in question the

(1) [1904] 1 K. B. 493, 502.

(2) Ibid. 497.

(3) [1903] 2 K. B. 756, 762, 764.

(4) E. B. & E. 485, 492.

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consideration cannot be said to have wholly failed merely because the frustration of the contract produced a result which, had it been due to some default, would have amounted to a failure of consideration. I find no authority to support this contention, which seems appropriate to an action for damages, but foreign to the action for money had and received. In *Rugg* v. *Minett* (1), the court seems to have proceeded on a principle contrary to that contended for when it allowed under this money count payments on account for unappropriated goods destroyed by accidental fire (2). There is no suggestion in the report of that case of any default on the part of the sellers. For these reasons I am of opinion that the appellants are entitled to succeed.

My Lords, I only desire to add that I am conscious that a conclusion relegating parties in cases of frustration to their contracts may not work out a completely just solution in the pecuniary sense. It happens that in this case it will do so, for the appellants, who did not get the goods or the documents, will get their money back, and the respondents have had the machines, which, so far as completed, were said by the respondents themselves to be realizable without loss. In other cases it might turn out otherwise, and the application of the rules of the civil law or of Scots law might work greater justice, but I do not understand that even those rules would cover the whole ground so as to effect an ideally just distribution of the burden of loss due to the frustration of contracts. But at least, or so it seems to me, the rule now to be laid down by this House is not only more agreeable to the law of England, but is more consistent with justice than the rule on which the courts below felt impelled to base their decision. At all events, parties to contracts will know that as the law stands the contract between them is the matter of crucial or final importance, and that if, as may very well be the case in time of war or impending war, frustration of their contracts is to be apprehended, they may make what contracts they think fit to provide in that event for the adjustment of the position between them.

LORD PORTER. My Lords, the task imposed on your Lordships is said to be a reconsideration of what has been described as the rule in *Chandler* v. *Webster* (3). That rule has been

(1) 11 East, 210.
(2) Ibid. 219.
(3) [1904] 1 K. B. 493.

variously stated by saying that in a case where a contract is frustrated (1.) the loss lies where it falls, and (2.) one who has paid money in advance under a contract which provides for the making of such payment cannot recover that money if the contract is afterwards frustrated. Whether either or both principles are to be found in *Chandler* v. *Webster* (1) need not be determined for the moment. The vital question is whether they are in fact accurate statements of the law. The question has given rise to much controversy, and it has been contended, on the one hand, that in case of total failure of consideration the sum paid should be recoverable on the ordinary principles applicable in English law, and, on the other, that the law is not so wanting in ingenuity as to be unable to apply the principles which are said to find favour in the Scottish courts and are discussed in *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (2), a decision which is alleged to determine that on some principle of restitution the payer can get back at least an equitable proportion of the sum which he has paid, though exactly what proportion and on what principle does not, I think, appear.

It may perhaps be advisable to dispose of the second contention at once. I can find no warranty for its application in English law. Under that system money had and received to the plaintiff's use can undoubtedly be recovered in cases where the consideration has wholly failed, but unless the contract is divisible into separate parts it is the whole money, not part of it, which can be recovered. If a divisible part of the contract has wholly failed and part of the consideration can be attributed to that part, that portion of the money so paid can be recovered, but unless this be so there is no room for restitution under a claim in indebitatus assumpsit. A partial failure of consideration gives rise to no claim for recovery of part of what has been paid. Indeed, the contrary has not been contended. What has been said is that the doctrine of frustration depends on the implication of an implied term. Reasonable persons, it is said, would not have had in mind the event which befell, but if they had they would have unhesitatingly said: "In that event all further obligation of "performance on either side is at an end." So far and no further it is acknowledged the law of this country has gone, but, it is urged, a system of jurisprudence which is astute enough to devise such a term is capable of adding to it the

(1) [1904] 1 K. B. 493.

(2) [1924] A. C. 226.

proviso that in such a case some equitable proportion of any sum paid in advance shall be recoverable when the contract becomes impossible of performance. It might be desirable that the law should make some such provision. Indeed the Law Revision Committee has so recommended, but without an Act of Parliament it is difficult to determine what sum shall be recoverable and on what principles. This difficulty is envisaged by Collins M.R. in *Chandler* v. *Webster* (1) and is apparent from a perusal of the report of the committee, but, however desirable the result, I can see no way by which in accordance with English authority or principle a right to recover some equitable sum can be implied.

The only other suggestion made to your Lordships on behalf of the appellants, and indeed, as I think, the only argument open to them, is that the money which they have paid is recoverable as on a consideration which has wholly failed. With that aspect I proceed to deal, merely prefacing my remarks by observing that, whether one adopts the principle that money so paid is recoverable or irrecoverable, one may be found to have treated one side or the other with considerable harshness. A contractor stipulates for payment in advance of the whole price of an article which he is to supply and has done nothing when the contract is frustrated. If he keeps the whole, perhaps if he keeps any part, of the money paid in advance, the buyer is hardly treated. On the other hand, he may have done the whole of the work on an article useless to anyone except the purchaser, but not delivered it, and if the buyer can recover his advance the whole loss will fall on the seller, and in that case the seller is as hardly treated as the buyer would be in the other. Moreover, the closely analogous case of a supplier who has obtained no advance but though he has done all the work has not delivered the goods and therefore is not able to demand payment, is left unredressed in England, as indeed it is in Scotland. It is possible to say that the seller in such a case who has been prudent enough to stipulate for a payment in advance should reap the advantage of his foresight, but to do so is to speculate as to the object for which the advance was obtained, not to ascertain what his legal remedies are upon the facts as known. In these circumstances I see nothing for it but to neglect considerations of hardship in individual cases and to consider only abstract principles of law.

The doctrine that money payable in advance, under a

(1) [1904] 1 K. B. 493, 500.

contract which is afterwards frustrated, is irrecoverable is not of old standing. It began, I think, with the so-called coronation cases. It is true that in *Appleby* v. *Myers* (1) Blackburn J. says of the destruction of the premises: "It is a misfortune equally "affecting both parties; excusing both from further perform-"ance of the contract but giving a cause of action to neither," but this was said in a case where no question of money paid in advance arose and has reference only to the facts of that case. Of the other cases quoted to us which were decided about the same period, *Stubbs* v. *Holywell Ry. Co.* (2), *Whincup* v. *Hughes* (3) and *Anglo-Egyptian Navigation Co.* v. *Rennie* (4) are, I think, cases where the consideration was partly performed. In the last-mentioned case, Denman J., in delivering the judgment of the court, was careful to point out that the contract was "substantially a contract for work and labour": and much work and labour had undoubtedly taken place before further performance of the contract became impossible. It is true, however, that advance freight by long custom cannot be recovered though the goods shipped are never delivered. *Byrne* v. *Schiller* (5) and *Allison* v. *Bristol Marine Insurance Co., Ld.* (6) so declare. The decision was reached with regret. In the former case Cockburn C.J. says (7) he thinks the rule "founded "on an erroneous principle and anything but satisfactory," and Montague Smith J. (8) regards it as the result of an implied term. In the latter Lord Hatherley says (9): "We have to "remember that from a very early period, as long ago, it was "said during the argument, as the time of Charles II.—at all "events for a very long time—it has been settled in our mari-"time law that prepaid freight cannot be recovered back," and all their Lordships seem to have been influenced by the fact that it was the practice for the merchant to insure prepaid freight, and, indeed, of the shipowner to make an allowance for that purpose. This may be the principle applied in *French Marine* v. *Compagnie Napolitaine* (10) by the majority of the House, or it may be that the grounds of that decision are to be found in the words of Lord Sumner (11): "Here there was no total "failure of consideration but a partial failure only, for which in

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(1) L. R. 2 C. P. 651, 659.
(2) L. R. 2 Ex. 311.
(3) L. R. 6 C. P. 78.
(4) L. R. 10 C. P. 271, 283.
(5) L. R. 6 Ex. 319.
(6) (1875) 1 App. Cas. 209.
(7) L. R. 6 Ex. 319, 325.
(8) Ibid. 327.
(9) 1 App. Cas. 209, 235, 236.
(10) [1921] 2 A. C. 494.
(11) Ibid. 517.

"law no pro rata repayment could be claimed." On either view it is not decisive of the present case.

If I am right in supposing that cases of advance freight form a class by themselves and that the other cases referred to are examples of a partial failure of consideration, the doctrine that money paid in advance in pursuance of the terms of a contract which is afterwards frustrated cannot be recovered originates, if it originates at all, with the coronation cases. They were conveniently tabulated by Mr. Holmes in the course of his argument. *Clark* v. *Lindsay* (1) and *Griffith* v. *Brymer* (2) may be disregarded, since in each case the contract was entered into under a mistake of fact as to the state of the King's health at the time when they were made, and, therefore, both were void ab initio. *Blakeley* v. *Muller & Co.* (3) and *Lumsden* v. *Barton & Co.* (4) may, I think, be regarded as instances of contracts partially performed, though the former seems to contain language applicable to contracts wholly unperformed. *Krell* v. *Henry* (5) merely decided that money not due when the frustration took place was not in law payable, but *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (6) and *Chandler* v. *Webster* (7) are authorities for the general proposition that money paid in advance under the terms of a frustrated contract cannot be recovered. In *Blakeley* v. *Muller & Co.* (8) Wills J. founded his decision on *Appleby* v. *Myers* (9) and said: "The argument for the plaintiffs "must be that the contract was rescinded ab initio," and Channell J. relied on the analogy of advance freight and added (10): "All that can be said is that, when the procession "was abandoned, the contract was off, not that anything done "under the contract was void. The loss must remain where it "was at the time of the abandonment." I quote from his judgment because it was adopted by Lord Halsbury L.C., sitting in the Court of Appeal, in *Civil Service Co-operative Society, Ld.* v. *General Steam Navigation Co.* (11), and is, I think, the foundation of the decision in *Chandler* v. *Webster* (7). In the latter case the leading judgment was delivered by Collins M.R. who, in relying on *Taylor* v. *Caldwell* (12) said

(1) 88 L. T. 198.
(2) 19 T. L. R. 434.
(3) [1903] 2 K. B. 760*n*.
(4) 19 T. L. R. 53.
(5) [1903] 2 K. B. 740.
(6) [1903] 2 K. B. 756.
(7) [1904] 1 K. B. 493.
(8) [1903] 2 K. B. 760*n*, 761*n*.
(9) L. R. 2 C. P. 651.
(10) [1903] 2 K. B. 760*n*, 762*n*.
(11) [1903] 2 K. B. 756, 764.
(12) 3 B. & S. 826.

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that (1) where, owing to frustration, "the contract can no "further be performed by either party it remains a perfectly "good contract up to that point and everything previously "done in pursuance of it must be treated as rightly done, but "the parties are both discharged from further performance "of it. If the effect were that the contract were wiped out "altogether no doubt the result would be that money paid "under it would have to be repaid as on a failure of consider-"ation. But that is not the effect of the doctrine; it only "releases the parties from further performance of the contract. "Therefore the doctrine of failure of consideration does not "apply." To the same effect Romer L.J. said (2): "Except "in cases where the contract can be treated as rescinded ab "initio, any payment previously made and any legal right "previously accrued according to the terms of the agreement "will not be disturbed."

The doctrine as so stated appears to be confined to the termination of contracts by excusable impossibility and to enunciate a feature peculiar to such cases. I know of no authority other than the so-called coronation cases and those which have followed them in which such a doctrine is promulgated, and except the statements contained in those cases, weighty and formidable though they be, I can find no principle to support it. It is not, I think, accurate to say in general—nor did the respondents' advocates seek to support such a statement—that money had and received can only be recovered as on a consideration which failed in cases where the contract is void ab initio. The true view is, I think, expressed by Brett L.J. (as he then was) in *Wilson* v. *Church* (3), a case in which he refused to find fraud. His words are: "The principle of law "seems to me to be identical with what it would be if the money "were paid to the borrowers for a consideration which is to be "accomplished after the payment of the money, and by the "most ordinary principle of law, where money is paid for a "consideration which is to be performed after the payment, if "that consideration wholly fails, the money becomes money "in the hands of the borrowers held to the use and for the "benefit of the lenders, and must be returned." The decision in that case was affirmed in your Lordships' House under the title *National Bolivian Navigation Co.* v. *Wilson* (4), and the language of Brett L.J. was approved by Lord Haldane L.C. in

(1) [1904] 1 K. B. 493, 499.

(2) Ibid. 501.

(3) 13 Ch. D. 1, 49.

(4) 5 App. Cas. 176.

Royal Bank of Canada v. *Reg.* (1). It may be urged that these were cases of borrowed money and that there was fault, though not fraud, in the borrower. I do not think that the decision turned on so narrow a ground, but in truth the principle may be illustrated by the law which is now codified in ss. 6 and 7 of the Sale of Goods Act, 1893, and was formerly illustrated by *Rugg* v. *Minett* (2). The two sections deal with two cases of impossibility arising in the cases of the sale of ascertained goods. The first section treats of a case where the goods have perished before the agreement for sale is made and is an example of a contract void ab initio. *Clark* v. *Lindsay* (3) and *Griffith* v. *Brymer* (4) are illustrations of the same doctrine translated from the sphere where the tangible subject-matter of the contract perished to that where supervening impossibility prevented the achievement of the object with which the contract was entered into. The second section, on the other hand, treats of a contract validly made and continuing in existence until the goods perish. It is not void ab initio, but further performance is excused after the destruction has taken place, yet the price is returnable because the consideration for the whole or the part undelivered has wholly failed, as the section says "without fault on either side."

This is, I think, the rule generally applicable, but it is not always so. There are cases where the payer pays not for the performance of the receiver's promise but for the promise itself—not for the doing of something but for the chance that it may be done. This, I think, was Mathew L.J.'s view in *Chandler* v. *Webster* (5) when he says: "I think the payment "of the 100*l.* by the plaintiff was intended to be a final payment "in pursuance of the contract, and I do not think such a pay-"ment can be recovered back." The respondents relied on this statement and maintained that the present, like the "coronation cases," was an instance of a final payment which could not be recovered. They also contended that no recovery was possible except in cases where the contractor who has received the money in advance was in fault in some way. I can find no authority for the second argument, and it is, I think, contrary to the views expressed by the Court of Exchequer in *Knowles* v. *Bovill* (6). It is true that in the majority of cases the consideration fails because one party or the other fails to

(1) [1913] A. C. 283, 296.
(2) 11 East, 210.
(3) 88 L. T. 198.
(4) 19 T. L. R. 434.
(5) [1904] 1 K. B. 493, 502.
(6) (1870) 22 L. T. 70.

carry out his contract, but it is not the breach but the failure of consideration which enables money paid in advance to be recovered.

The question whether the payment of the 1000*l.* in advance in the present case was a " final payment " or not depends on no general principle of law but on the wording of the contract in this particular case. To my mind, clearly it was not. The contract was for the sale of machines c.i.f. Gdynia. It is true that there was an additional provision for the services of a skilled monteur, but, in my view, the contract would have been substantially fulfilled by shipping the goods to Gdynia and furnishing the requisite documents against payment of the balance of the price, though a failure to provide a monteur might have given rise to a claim for damages. The price was a lump sum price to be paid in two portions, namely, one-third with the order, balance against shipping documents, but the sum payable in advance was part of the lump sum price payable for the completed articles. The goods remained the property and at the risk of the sellers until the documents were presented and taken up. The case seems to me to come exactly within the principle of s. 7 of the Sale of Goods Act, 1893, and had they been destroyed by enemy action I cannot doubt but that the advance portion of the price would have been recoverable. That the inability of the respondents to implement their contract was due to supervening illegality and not to destruction of the subject-matter appears to me to make the appellants' claim at least no weaker. Whether it strengthens it has not been discussed and is unnecessary to determine.

Having regard to these considerations, in my view, the dicta of Collins M.R. in *Chandler* v. *Webster* (1) cannot be supported, and I think the decision itself is wrong unless it can be said that in that, as in some of the other cases, there was some partial performance which I have not been able to discover in the report of the case. The error, as I see it, in the dicta which have been used is in imagining that the statement, "the loss lies where it falls " is conclusive of the matter. I think it is true to say that the loss lies where it falls, but that expression only means that the rights of the parties are to be determined at the moment when impossibility of further performance supervenes. If at that moment the party who has advanced money is by the ordinary rules of the common

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law entitled to say that the consideration has now wholly failed, he can, in my view, enforce the rights given by those rules and recover the money. The other arguments on behalf of the respondents I need not discuss. I agree with all your Lordships in thinking that they fail. If I thought that the question had been concluded by any decision in your Lordships' House I would, of course, follow that authority, but it plainly is open to review. In support of this opinion I need only refer to the observations of Lord Birkenhead in *Cantiare San Rocco S.A.* v. *Clyde Shipbuilding and Engineering Co., Ld.* (1). I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *A. Kramer & Co.*

Solicitors for respondents: *Maxwell, Batley & Co., for Simpson, Curtis & Co., Leeds.*

(1) [1924] A. C. 226, 233.

F. H. C.

[HOUSE OF LORDS.]

H. L. (E.)*

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July 10, 23.

SMART BROTHERS, LIMITED . . . . APPELLANTS;

AND

ROSS . . . . RESPONDENT.

Emergency legislation—Hire-purchase contract—Payments in arrear—Agreement between parties to determine contract—Owners to retake goods and refund part of money paid by hirer—Bargain freely entered into—No necessity to obtain leave of court—Courts (Emergency Powers) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 67), *s.* 1, *sub-s.* 2 (*a*) (*ii.*)—*Liabilities (War-Time Adjustment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *s.* 26, *sub-s.* 2.

A contract of hire-purchase of furniture entered into in September, 1938, provided that the hirer might terminate the hiring by returning the goods at her own cost and that in case of breach of any term of the contract the owners might retake the goods. In 1941, the hirer informed the owners that she was unable to keep up payment of the instalments and asked them whether, if they resumed possession of the furniture, they would make her an allowance of money. In June, 1941, the parties agreed that the owners should retake the furniture and should return to the hirer 10*l.* out of the sum which she had already paid

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and release her from liability for arrears of hire. A summons was taken out by the owners to which the hirer was the defendant, asking whether this agreement to determine the hire-purchase contract could be carried out without first obtaining the leave of the court under the Courts (Emergency Powers) Act, 1939, s. 1, sub-s. 2 (*a*) (ii.) :—

Held, that the owners were not bound to obtain the leave of the court, since they were exercising no remedy available to them by way of taking possession of the property within the meaning of the sub-section, either directly or indirectly, but were resuming full control and ownership of the furniture under the terms of a new bona fide agreement, freely entered into and cancelling the old, which did not involve the exercise of a remedy available to the owners at all, whether by consent or otherwise.

Soho Square Syndicate, Ld. v. *E. Pollard & Co.* [1940] Ch. 638, and *Bowmaker, Ld.* v. *Tabor* [1941] 2 K. B. 1, distinguished.

Decision of the Court of Appeal [1942] Ch. 158, reversed.

APPEAL from the Court of Appeal.

The facts as stated by Viscount Simon L.C. were as follows: The respondent, Miss Sadie Ross, entered into a hire-purchase agreement with the appellants, Smart Brothers, Ld., dated September 3, 1938, whereby the latter, as owners, let, and the former, as hirer, hired furniture valued in the schedule at the agreed figure of 52*l*. 3*s*. 6*d*. Under cl. 1 of the agreement the hirer paid 2*l*. 4*s*. down, as an irrecoverable deposit, and contracted to pay instalments of 1*l*. 5*s*. each month until the total amount paid was equal to the agreed value, whereupon the furniture would become her property. Clauses 6, 8 and 9 of the agreement were as follows: "6. The hirer may terminate "the hiring by returning the goods to the owners at the hirer's "own cost subject to cl. 9, the hirer remaining liable for "arrears of instalments (apportioned if necessary) up to the "date of such return and damages for breach hereof (if any). " . . . . 8. In case of any breach of any term hereof the "owners may: (*a*) without prejudice to their claim for "arrears of instalments or damages for breach of this agree-"ment forthwith without notice terminate the hiring and "repossess themselves of and remove the goods (for which "purpose their servants or agents may enter any premises the "hirer may enter); (*b*) alternatively, by written notice sent "(by post or otherwise) to or left at the hirer's last known "address forthwith and for all purposes absolutely determine "and end this agreement and the hiring thereby constituted "and thereupon the hirer shall no longer be in possession of "the goods with the owners' consent nor shall either party "thereafter have any rights hereunder but such termination "shall not discharge any pre-existing liability of the hirer to "the owners. 9. If the hirer exercises his or her rights under "cl. 6, or if the owners have to take possession under cl. 8 (*a*), "the hirer shall become liable to the owners for any sum "necessary to make the amount paid under cl. 1 equal to "33⅓ per cent. of the total amount set out in the schedule for "compensation and depreciation of the said goods."

The furniture was delivered to the respondent at Highbury and later removed by her, with the consent of the appellants, to Croydon. The respondent fell into arrears with her monthly instalments, owing to unemployment and other misfortunes, and obtained from the appellants some concessions postponing time of payment on that account. In January, 1941, she arranged to store the furniture with the appellants at their warehouse free of charge. It was agreed that she should pay 1*l.* a month in respect of current rent and arrears, but she only paid one instalment. On March 14, 1941, the appellants reminded her by letter that she was in arrear. She then wrote to them from Cornwall: "I sent my furniture back to "you to store in January last. My account number was "R.947. I regret that I have not been able to pay any more "on this and you will see by the above address that I am no "longer in London. I was ill and had to go away. I paid for "my furniture regularly when I had it and had paid altogether "roughly about 24*l.* As I am not able to pay more and you "have all the stuff back is it possible for me to have a small "allowance back? I do not expect much but I am ill and "out of work and a little money would help me. An early "reply will oblige." Thereupon, the appellants expressed their willingness to receive back the furniture, to release the respondent from arrears of hire, and to refund her the sum of 10*l.* out of the amount she had paid. Accordingly, the respondent signed a form (undated but executed about June 5, 1941), the terms of which had been settled by the appellants, stating: "I confirm that it is my desire to determine my hire-purchase agreement dated September 3, 1938, "with you which I hereby do, pursuant to my right to do so "under the Hire Purchase Act, 1938. It is clearly understood "between us that upon my returning the goods as agreed to "you, I shall be under no further liability to you for arrears "of hire, and that you will return to me 10*l.*, being part of "the sum I have paid on account of instalments under the "agreement." The 10*l*. was paid and the respondent expressed herself as satisfied, but the doubt arose whether this compromise was permissible, having regard to s. 1, sub-s. 2 (*a*) (ii.) of the Courts (Emergency Powers) Act, 1939, and s. 26, sub-s. 2 (*a*) of the Liabilities (War-Time Adjustment) Act, 1941, without the leave of the court. To determine this question, an originating summons was issued by arrangement between the appellants as plaintiffs and the respondent as defendant for the determination of the question whether, having regard to the above-mentioned enactments, the appellants were entitled, on the true construction of the Acts and in the events that had happened, to retake possession of the furniture without obtaining the leave of the appropriate court. The summons came before Uthwatt J., who declared that the appellants were so entitled, and that no leave was required. In the Court of Appeal there was a difference of opinion, MacKinnon and Clauson L.JJ. holding that the decision should be reversed, while Lord Greene M.R. agreed with the view of Uthwatt J. The appellants appealed to the House of Lords.

Lynskey K.C. and *A. A. Pereira* for the appellants. It was possible for the appellants to come to a valid agreement with the respondent to enable them to resume possession of their property without an application to the court, and the return of the goods was a bona fide exercise of the option given to the respondent by cl. 6 of the hire-purchase agreement as she was not submitting to an exercise of the appellants' right to seize the goods. The appellants were not exercising any remedy available to them by way of taking possession of the property within s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act, 1939, or s. 26, sub-s. 2 (*a*), of the Liabilities (War-Time Adjustment) Act, 1941. They were resuming control of the goods under the new agreement of June 5, 1941, freely entered into by the respondent. *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1) and *Bowmaker, Ld.* v. *Tabor* (2) are distinguishable.

O'Sullivan K.C. and *Longland* for the respondent. The legislature has imposed a fetter on persons exercising remedies against debtors and hirers. The enactment was intended to have a simple and certain meaning, i.e., that once a remedy becomes available to a creditor by reason of a default on the part of the debtor or hirer the fetter attaches to the creditor's

(1) [1940] Ch. 638.

(2) [1941] 2 K. B. 1.

action. Accordingly, the appellants required the leave of the court, because, by retaking possession of the goods, they were exercising a remedy available to them "by way of . . . . "the taking of possession" of the property within s. 1, sub-s. 2 (*a*) (ii.), of the Courts (Emergency Powers) Act. The respondent was not entitled to give the appellants leave to take possession without fulfilling the statutory condition, nor could she waive her rights under the Act and allow them to proceed without leave of the court. The Act of 1939 is intended to protect poor persons who may not know the rights they have under it and, but for the protection of the court, might consent to terms disadvantageous to themselves. The respondent relies on the reasons given by MacKinnon L.J. in the Court of Appeal but not on those given by Clauson L.J. This case is covered by *Barton* v. *Fincham* (1) ; *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (2) and *Bowmaker, Ld.* v. *Tabor* (3).

The House took time for consideration.

1942. July 23. VISCOUNT SIMON L.C. My Lords, this appeal raises an important question as to the construction and application of s. 1 of the Courts (Emergency Powers) Act, 1939. That Act is an emergency statute, passed on September 1, 1939, just before we became involved in the war. It is an Act " to confer on courts certain powers in relation to "remedies in respect of the non-payment of money and the "non-performance of obligations (including powers in relation "to bankruptcy and winding-up proceedings), and to make "provision for purposes connected with the matters aforesaid." The first sub-section of s. 1 requires the leave of the court to be obtained for the enforcement of certain classes of judgments or orders for the payment or recovery of a sum of money. The second sub-section, which is the one under which the present question mainly arises, runs as follows : " Subject to "the provisions of this section, a person shall not be entitled, "except with the leave of the appropriate court, (*a*) to proceed "to exercise any remedy which is available to him by way of "(i.) the levying of distress ; (ii.) the taking of possession of "any property or the appointment of a receiver of any "property ; (iii.) re-entry upon any land ; (iv.) the realisation "of any security or the forfeiture of any deposit ; or (v.) the

(1) [1921] 2 K. B. 291.
(2) [1940] Ch. 638.
(3) [1941] 2 K. B. 1.

"serving of a demand under para. (I.) of s. 169 of the Com-"panies Act, 1929; or (*b*) to institute any proceedings for "foreclosure or for sale in lieu of foreclosure, or take any step "in any such proceedings instituted before the commencement "of this Act: Provided that this sub-section shall not apply "to any remedy or proceedings available in consequence of "any default in the payment of a debt, or the performance of "an obligation, being a debt or obligation arising by virtue of "a contract made after the commencement of this Act;" . . . . Sub-sect. 4 of s. 1 provides: " If, on any application for such "leave as is required under this section for the exercise of any "of the rights and remedies mentioned in sub-ss. 1, 2 and 3 "of this section, the appropriate court is of opinion that the "person liable to satisfy the judgment or order, or to pay the "rent or other debt, or to perform the obligation, in question "is unable immediately to do so by reason of circumstances "directly or indirectly attributable to any war in which His "Majesty may be engaged, the court may refuse leave for the "exercise of that right or remedy or give leave therefor subject "to such restrictions and conditions as the court thinks "proper." By s. 26, sub-s. 2 (*a*), of the Liabilities (War-Time Adjustment) Act, 1941, it is provided that: " A person shall "not be entitled, except with the leave of the appropriate "court, (*a*) to exercise or take any of the remedies or proceedings "mentioned in sub-s. 2 of s. 1 of the principal Act, other than "those mentioned in para. (*c*) and para. (*d*) of the proviso to "that sub-section which are available to him in consequence of "any default in the payment of a debt or the performance of "an obligation, being a debt or obligation arising by virtue "of a contract made after the commencement of the principal "Act." The " principal Act " means the Courts (Emergency Powers) Act, 1939, and the above s. 26, together with the Act of 1939 and an amending Act of 1940, are cited together as the Courts (Emergency Powers) Acts, 1939 to 1941.

Before this House, the case has been admirably argued on either side, and I have reached the conclusion that the appeal should be allowed. The reasons in support of this conclusion could not be more clearly stated than in the judgments of Uthwatt J. and of the Master of the Rolls, but out of respect for the view of the majority in the Court of Appeal, which, in my judgment, should be reversed, I will briefly state the grounds of my opinion.

The argument for the respondent is that the leave of the court is required because the appellants, by retaking possession of the furniture under the agreement of June 5, 1941, are "exercising" a "remedy" which is available to them "by "way of . . . . the taking of possession" of the furniture. The proviso to sub-s. 2 of s. 2 of the Act makes it clear that a "remedy" becomes available in consequence of "default," and here the respondent was in default for she was in arrear with her instalment-payments, but it does not follow that, because the remedy of retaking possession was available to the appellants, the appellants were in fact exercising it. On the contrary, as Uthwatt J. points out (1), the transaction expressed in the contract of June 5, 1941, carried out, on terms which the appellants were willing to concede, the respondent's desire to get rid of the hire-purchase agreement. It was not an exercise by the appellants of their remedy under cl. 8, though the consequence of carrying out the arrangement would be that the appellants resumed full possession of the goods. The respondent had the right, under cl. 6 of the agreement, to terminate the hiring on certain terms, without any leave from the court, and the arrangement made, which was initiated by the respondent herself, more closely resembles an agreed modification (not unfavourable to the respondent) of the terms of cl. 6 than it resembles an exercise of powers under cl. 8. Strictly speaking, it is neither. It is rather a new agreement freely entered into upon cancelling the old. Your Lordships would, I am sure, be most unwilling to cut down by judicial interpretation the protection which the Courts (Emergency Powers) Acts extend to those who, under the exigencies of war, might suffer unfairly from the unfettered exercise of remedies which the law provides in case of default in the payment of debts or the performance of obligations, but in the present case, as the Master of the Rolls observes (2), the arrangement was a perfectly bona fide one. The appellants had not threatened to seize the furniture. It was the respondent who was anxious to put an end to the whole transaction. A wholly different situation would arise if the form of the transaction was in any respect colourable, or concealed an exercise by the appellants of their remedy of seizure. Nothing of the sort, however, can be suggested on the facts of the present case. The construction which has commended itself to the majority of the Court of Appeal would have far-reaching consequences. Suppose that a landlord has let a farm to a

(1) [1942] Ch. 158, 162.

(2) [1942] Ch. 158, 163.

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tenant, who now owes a quarter's rent. If the tenant proposes to surrender the farm and to take a smaller one from his landlord instead, and the landlord agrees to the terms proposed, is the leave of the court required for such an arrangement? Surely not. In such a case the landlord may have had a right of re-entry for non-payment of rent, but he is not "exercising" this "remedy" when he re-enters, but, under a bona fide arrangement proposed by his tenant, is resuming possession of the larger farm originally let.

Our attention has been called to two previous decisions, one of Farwell J. in *Soho Square Syndicate, Ld.* v. *E. Pollard & Co.* (1), and the other of the Court of Appeal in *Bowmaker Ld.* v. *Tabor* (2). I agree with Uthwatt J. that these decisions raise no difficulty in the present case. They merely establish that, where the statute requires the leave of the court before a remedy can be exercised, that leave cannot be dispensed with by agreement between the parties. The point, however, which distinguishes those cases from the present is that here no "remedy" referred to in the statute is being "exercised" either directly or indirectly.

It remains to notice a further argument put forward in support of the view of the majority of the Court of Appeal and elaborated in the judgment of Clauson L.J. (3). This argument is based on the words of s. 26, sub-s. 2, of the Liabilities (War-Time Adjustment) Act, 1941, according to which the leave of the court is required for the exercise of remedies mentioned in s. 1, sub-s. 2, of the principal Act (with exceptions not relevant here) available in consequence of any default in the performance of an obligation arising by virtue of a contract made after the commencement of the principal Act. The contract of June 5, 1941, is such a contract, but I am unable to agree that any default in the performance of an obligation arising by virtue of *that* contract has taken place. With all respect to the learned lord justice, I do not think that the Act of 1941 creates any difficulty in the appellants' way, and, as it seems to me, the requirement of leave by the court in either statute has no application, because the appellants in the circumstances are not "exercising" a "remedy" available to them "by way of" the taking of possession, but are resuming the full control and ownership of the furniture under the terms of a bona fide agreement which does not

(1) [1940] Ch. 638.
(2) [1941] 2 K. B. 1.
(3) [1942] Ch. 158, 176.

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involve the exercise of a remedy available to the appellants at all, whether by consent or otherwise. I move that the appeal be allowed.

LORD ATKIN. My Lords, I entirely agree with the opinion which has just been given by the Lord Chancellor, and can express my reason for differing from the majority of the Court of Appeal in a sentence. The appellants are not seeking to exercise any remedy for a default in performance of the hire-purchase agreement, but are accepting performance of the new lawful agreement which displaced it. I agree that the appeal should be allowed and the order of Uthwatt J. restored.

LORD THANKERTON. My Lords, I agree.

LORD WRIGHT. My Lords, I agree.

LORD PORTER. My Lords, I also agree.

Appeal allowed.

Solicitors for both parties: *Tudor & Rowe.*

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May 11, 12, 14, 15; *Aug.* 5.

HAY OR BOURHILL . . . . APPELLANT;

AND

YOUNG . . . . RESPONDENT.

Negligence—Mental or nervous shock—Person affected beyond area of potential danger—Noise of collision of motor vehicles.

A motor cyclist, while negligently driving at an excessive speed, collided with a motor-car and was killed. The appellant, a fish-wife, standing about 45 feet from the point of impact on the far side of a stationary tramway-car from the platform of which she was unloading her basket, heard the noise although she did not see the accident, and suffered fright resulting in severe nervous shock which disabled her from carrying on her trade for some time, although she admitted that at the time she had no reasonable fear of immediate bodily injury to herself. At the time she was eight

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months pregnant and about a month later the child was stillborn, owing to the injuries sustained by her :—

Held, (1.) that the duty of the motor cyclist on the public road to other persons using it was to drive with such reasonable care as would avoid the risk of injury (including injury by shock although no direct impact occurred) to such persons as he could reasonably foresee might be injured by his failure to exercise that care; (2.) that the appellant was not within the area of potential danger arising as the result of his negligence, and, accordingly, he owed no duty to her and was not guilty of negligence in relation to her.

Semble. On this point the law of England is the same as that of Scotland.

Decision of Court of Session 1941 S. C. 395 affirmed.

APPEAL from Second Division of Court of Session.

The facts, as stated by LORD THANKERTON, were as follows: The appellant, Mrs. Euphemia Bourhill (formerly Hay), was pursuer in an action of reparation in which she claimed damages from the respondent, James Young, as executor-dative of the late John Young, in respect of injuries alleged to have been sustained by her owing to the fault of John Young on the occasion of a collision between a motor-cycle which the latter was riding and a motor-car on October 11, 1938, which resulted in the death of John Young, hereinafter referred to as "the cyclist." Her plea was that she had "sustained loss, injury and damage "through the fault of the said John Young" and that she was "entitled to reparation therefor out of his estate." After a proof Lord Robertson, the Lord Ordinary, assoilzied the respondent on the ground that the cyclist had not been guilty of any breach of duty to the appellant, and this decision was affirmed by the Second Division of the Court of Session, Lord Justice-Clerk Aitchison dissenting. The appellant, who was a fishwife, was a passenger on a tram which was proceeding in the direction of Colinton along the Colinton Road, Edinburgh, running in a south-westerly direction, and stopped at a stopping-place at a short distance before Colinton Road was joined at right angles by Glenlockhart Road from the south-east, that is, on the near side of the tram. The appellant alighted, and went round the near side and front of the tram to lift her fish-basket from the off-side of the driver's platform. Meantime, the cyclist, travelling in the same direction as the tram, had come up and, as the appellant was getting her basket, he passed on the near side of the tram. When mostly across the opening of Glenlockhart Road, his cycle collided

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Lookee! — That's a [illegible]!

with a motor-car which had been travelling in the opposite direction but had turned across the path of the cycle to enter Glenlockhart Road. The cyclist, who was held by the Lord Ordinary to have been travelling at an excessive speed, was thrown on to the street and sustained injuries from which he died. The appellant saw and heard nothing of the cyclist until the noise created by the impact of the two vehicles reached her ears. At that moment she had her back to the driver's platform, and the driver was assisting to get the basket on to her back and the broad leather strap on to her forehead. The distance between the appellant and the point of impact was between forty-five and fifty feet. In her evidence she stated that on hearing the crash "I just got in a pack of "nerves, and I did not know whether I was going to get it or "not." After the cyclist's body had been removed, the appellant approached and saw the blood left on the roadway. The injuries alleged to have been sustained by the appellant were set out in condescendence 4 of the record as follows: "As an immediate result of the violent collision and the "extreme shock of the occurrence in the circumstances "explained, the pursuer wrenched and injured her back and "was thrown into a state of terror and sustained a very severe "shock to her nervous system. *Explained that the pursuer's* "*terror did not involve any element of reasonable fear of immediate* "*bodily injury to herself.* The pursuer was about eight months "pregnant at the time, and gave birth to a child on November "18, 1938, which was stillborn owing to the injuries sustained "by the pursuer." The words italicized were inserted by amendment in the Inner House after the Lord Ordinary had dismissed the action as irrelevant, and, as the result of the reclaiming motion, the case was sent to proof before answer. After the proof the Lord Ordinary expressed his view that, while the appellant had sustained a nervous shock as the result of hearing the noise of the collision which disabled her from carrying on her business for some time, she had failed to prove either that the death of the child in utero or the injury to her back resulted from the shock or her immediate reaction to the fright of the event. The respondent did not dispute the finding of the Lord Ordinary that she had sustained a nervous shock, which affected her business, and this finding was admittedly sufficient to raise the question of liability. The appellant having appealed to the House of Lords, the House decided to have the argument on liability completed on both sides before considering the other injuries alleged to have resulted.

Duffes K.C. (of the English Bar, K.C. of the Scottish Bar) and *G. Reid* (of the Scottish Bar) for the appellant. To sustain an action for damages for negligence it is not necessary to prove physical impact. Fright resulting in illness is sufficient. The law does not ignore the natural reactions of the mind in connecting an accident with its consequences: *Wagner* v. *International Ry. Co.*, per Cardozo J. (1). The duty of the cyclist in the present case should be defined along the lines of the definition by Atkin L.J. in *Hambrook* v. *Stokes Brothers* (2). It is a duty owed to every member of the public to drive with reasonable care so as to avoid injuring those using the highway, even though the type of damage may be unexpected, namely, shock. The cyclist in the present case failed in that care and was responsible for any resulting damage to person or property. A careless pedestrian who walking in a hurry negligently knocks against another person is liable for all the consequences of his negligence, however unexpected they are, e.g., if he knocks down a man with an unusually thin skull or if he pushes a man off the pavement and causes him to be run over. When the court is considering liability for the effects of an act of negligence it is not limited to the natural and probable results of it. [They referred to *Haynes* v. *Harwood* (3); *Wilkinson* v. *Downton* (4); *Smith* v. *Johnson & Co.* (5); *Smith* v. *London and South Western Ry. Co.* (6); *Bell* v. *Great Northern Ry. Co. of Ireland* (7); *H.M.S. London* (8); *Pugh* v. *London Brighton and South Coast Ry. Co.* (9); *Cooper* v. *Caledonian Ry. Co.* (10); *Gilligan* v. *Robb* (11); *Ross* v. *Glasgow Corporation* (12); *Brown* v. *Glasgow Corporation* (13); *Currie* v. *Wardrop* (14); *A.* v. *B.'s Trustees* (15); *Walker* v. *Pitlochry Motor Co.* (16); *Dumbreck* v. *Robert Addie & Sons (Collieries), Ld.* (17).] Assuming that there is a limit to the liability of a person who drives negligently for

(1) (1921) 232 N. Y. 176, 180.
(2) [1925] 1 K. B. 141, 156, 157, 158.
(3) [1935] 1 K. B. 146.
(4) [1897] 2 Q. B. 57.
(5) (1897) Unrep.
(6) (1870) L. R. 6 C. P. 14.
(7) (1890) 26 L. R. Ir. 428.
(8) [1914] P. 72, 76.
(9) [1896] 2 Q. B. 248.
(10) (1902) 4 F. 880.
(11) 1910 S. C. 856.
(12) 1919 S. C. 174.
(13) 1922 S. C. 527.
(14) 1927 S. C. 538.
(15) (1906) 13 Sc. L. T. 830.
(16) 1930 S. C. 565.
(17) 1929 S. C. (H. L.) 51.

damage caused by his negligence, the test of the limit is not proximity in space (subject, however, to the qualification that where the damage sustained occurs at an extravagant distance away from the scene of the accident, as where a person suffers shock by witnessing it through a telescope there may be no liability: see *In re Polemis and Furness, Withy & Co., Ld.* (1)). In a claim in respect of shock it is sufficient if the accident is near enough to affect a reasonable person. The question for the House is whether the view of Kennedy J. in *Dulieu* v. *White & Sons* (2) that to give rise to a cause of action "the shock, where it operates "through the mind, must be a shock which arises from a "reasonable fear of immediate personal injury to oneself" is correct, or whether the opposite view expressed in *Hambrook* v. *Stokes Brothers* (3) and *Owens* v. *Liverpool Corporation* (4), for which the appellant contends, should prevail. The whole trend of the English authorities is in favour of the appellant. The Scottish authorities do not cover exactly this type of case, but *A.* v. *B.'s Trustees* (5) is directly in her favour and it has never been challenged in the Inner House. In *Harris* v. *Mobbs* (6) and *Wilkins* v. *Day* (7) the plaintiffs recovered damages in respect of accidents resulting from fright caused to horses through the negligence of the defendants. In the case of fright to a human being it would likewise be unreasonable to scrutinize the cause of nervous shock to find whether the fright was reasonable. The injury to the appellant was a direct result of the negligence of the cyclist.

Blades K.C. and *Guthrie* (both of the Scottish Bar) for the respondent. The cyclist owed no duty to the appellant and only a breach of duty can constitute actionable negligence. Nor was the injury to her the natural and probable result of his careless driving. She did not see the accident and she was in no danger. She only heard the noise of the collision and there is no authority in England or in Scotland for the proposition that there may be liability in damages for causing a loud noise. Whatever may be the law of England, in the law of Scotland nervous shock as giving rise to a cause of action is subject to the limitation that it must arise from a reasonable fear of bodily injury, and here there neither was, nor could have been, such a fear. Mere fright without fear is not actionable in the law of Scotland. On the facts this case is distinguishable from *Hambrook* v. *Stokes Brothers* (1), but, in any event, in *Currie* v. *Wardrop* (2) doubt was expressed whether that authority was in accordance with the law of Scotland: see also *Donoghue* v. *Stevenson* (3). [They referred to *Macintosh* v. *Mackintosh* (4); *Wernham* v. *M'Lean, Baird & Neilson* (5); *Campbell* v. *James Henderson, Ld.* (6); *Ross* v. *Glasgow Corporation* (7); *Brown* v. *Glasgow Corporation* (8); and Glegg on Reparation, 3rd ed., p. 7.]

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(1) [1921] 3 K. B. 560.
(2) [1901] 2 K. B. 669, 675.
(3) [1925] 1 K. B. 141.
(4) [1939] 1 K. B. 394.
(5) 13 Sc. L. T. 830.
(6) (1878) 3 Ex. D. 268.
(7) (1883) 12 Q. B. D. 110.

Duffes K.C. in reply. The drivers in *Hambrook* v. *Stokes Brothers* (1) and *Owens* v. *Liverpool Corporation* (9) owed no duty to the plaintiffs in those cases which the cyclist did not owe to the appellant in this case. His was a general duty to drive so as to avoid a collision which did in fact endanger the appellant and cause injury to her nervous system. That duty was owed to all persons in the vicinity who might be affected. Anything may happen to a reckless driver who may strike one object on the first impact and others afterwards. Persons are often injured by vehicles without anticipation on the part of the driver and the question of reasonable anticipation is beside the point. The general alarm and unreasoned fear suffered by the appellant were a natural reaction on her part to the want of care of the cyclist.

The House took time for consideration.

1942. Aug. 5. LORD THANKERTON. My Lords, while both the Lord Ordinary and Lord Jamieson refer to an apparent inconsistency between the evidence given by the appellant at the trial, and the averment added by amendment that the appellant's terror did not involve any element of reasonable fear of immediate bodily injury to herself, the argument of the appellant before this House was conducted on the footing that the added averment was correct. Indeed, the appellant's argument was that the shock ensued without any functioning of the brain at all. I am content to consider the question of liability on this footing.

(1) [1925] 1 K. B. 141.
(2) 1927 S. C. 538.
(3) [1932] A. C. 562.
(4) (1864) 2 M. 1357, 1362, 1369.
(5) 1925 S. C. 407, 422.
(6) (1915) 1 Sc. L. T. 419.
(7) 1919 S. C. 174.
(8) 1922 S. C. 527.
(9) [1939] 1 K. B. 394.

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It is clear that, in the law of Scotland, the present action can only be based on negligence, and "it is necessary for the "pursuer in such an action to show there was a duty owed to "him by the defenders, because a man cannot be charged "with negligence if he has no obligation to exercise diligence": per Lord Kinnear in *Kemp & Dougall* v. *Darngavil Coal Co., Ld.* (1). I may further adopt the words of Lord Johnston in the same case (2), "the obligee in such a duty must be a "person or of a class definitely ascertained, and so related by "the circumstances to the obligor that the obligor is bound, "in the exercise of ordinary sense, to regard his interest and "his safety. Only the relation must not be too remote, for "remoteness must be held as a general limitation of the "doctrine." My Lords, I doubt whether, in view of the infinite variation of circumstances which may exist, it is possible or profitable to lay down any hard and fast principle, beyond the test of remoteness as applied to the particular case. The Lord Justice-Clerk, who dissented, accepted the test of proximity, although it is a little difficult to follow how he made his conclusion satisfy this test. In the observations that I have to make, I shall confine myself to the question of the range of duty of a motor-cyclist on the public road towards other passengers on the road. Clearly this duty is to drive the cycle with such reasonable care as will avoid the risk of injury to such persons as he can reasonably foresee might be injured by failure to exercise such reasonable care. It is now settled that such injury includes injury by shock, although no direct physical impact or lesion occurs. If, then, the test of proximity or remoteness is to be applied, I am of opinion that such a test involves that the injury must be within that which the cyclist ought to have reasonably contemplated as the area of potential danger which would arise as the result of his negligence, and the question in the present case is whether the appellant was within that area.

I am clearly of opinion that she was not, for the following reasons. Although, admittedly, going at an excessive speed, the cyclist had his machine under his control, and this at once distinguishes this case from such cases as those where the motor has been left standing unoccupied and insufficiently braked, and has started off on an uncontrolled career. At the time of the collision with the motor-car he was well past the tramcar, and the appellant was not within the range of his vision, let alone that the tramcar obstructed any view of her. The risk of the bicycle ricochetting and hitting the appellant, or of flying glass hitting her, in her position at the time, was so remote, in my opinion, that the cyclist could not reasonably be held bound to have contemplated it, and I differ from the Lord Justice-Clerk on this point, but, as already stated, the appellant's case is not now based on any fear of such possibilities, but merely on the sound of the collision. There is no suggestion that the volume of the noise of the collision afforded any ground for argument, and I am clearly of opinion that, in this case, the shock resulting to the appellant, situated as she was, was not within the area of potential danger which the cyclist should reasonably have had in view. In my opinion, none of the cases cited presents sufficiently analogous circumstances, such as should control the decision in the present case.

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(1) 1909 S. C. 1314, 1319.

(2) Ibid. 1327.

The dictum of Kennedy L.J. in *Dulieu* v. *White & Sons* (1), may well afford a useful test, in appropriate cases, of the area of potential danger, but I am not prepared to accept it as a conclusive test in all cases. That dictum has received considerable acceptance in Scottish cases. There may be circumstances in which it should not be applied, and I prefer to treat each case on its own facts as it arises, with assistance from cases in which the facts are so analogous as to afford guidance. It would not be right, however, in view of the attention paid to them in argument and in the opinions of the learned judges, not to refer to three of the English decisions. In *In re Polemis and Furness, Withy & Co., Ld.* (2), in the Court of Appeal, where the issue only related to the question of damages, Bankes L.J. said (3): "What a defendant ought to have "anticipated as a reasonable man is material when the question "is whether or not he was guilty of negligence, that is, of want "of due care according to the circumstances. . . . . In the "present case the arbitrators have found as a fact that the "falling of the plank was due to the negligence of the defendants' "servants. The fire appears to me to have been directly "caused by the falling of the plank. Under these circum- "stances I consider that it is immaterial that the causing of "the spark by the falling of the plank could not have been "reasonably anticipated." The case is, therefore, of no assistance here, and I have no occasion to consider whether

(1) [1901] 2 K. B. 669, 675.
(2) [1921] 3 K. B. 560.
(3) Ibid. 571.

the principle so laid down as to assessment of damages correctly states the law of England and, if so, whether the law of Scotland is the same. The same is true of *Hambrook* v. *Stokes Brothers* (1), which was the case of a motor lorry left at the top of a steep and narrow street unattended, with the engine running and without being properly secured, with the consequence that the lorry started off by itself and ran violently down the incline. My noble and learned friend Lord Atkin, then Atkin L.J., said (2): "I agree that in the "present case the plaintiff must show a breach of duty to her, "but this she shows by the negligence of the defendants in "the care of their lorry. I am clearly of opinion that the "breach of duty to her is admitted in the pleadings." But there are certain obiter dicta on the question of duty, which might be considered too wide, and I reserve any opinion on them. The remaining case is *Owens* v. *Liverpool Corporation* (3), in which the defendants' tramcar collided with a hearse, damaged it and caused the coffin to be overturned, and mourners were held entitled to recover damages for mental shock, although there was no apprehension, or actual sight, of injury to a human being. While each case must depend on its own circumstances, I have difficulty in seeing that there was any relationship of duty between the parties in that case.

I am, therefore, of opinion that the appellant has failed to establish that, at the time of the collision, the cyclist owed any duty to her, and that the appeal fails. I, accordingly, move that the appeal be dismissed, that the judgment appealed from be affirmed, and that the appellant pay the respondent's costs of the appeal.

LORD RUSSELL OF KILLOWEN (read by LORD THANKERTON). My Lords, the foundation of the appellant's claim is fault or negligence alleged against John Young, an allegation which postulates a breach by him of some duty owed by him to her. Therefore, the first essential for the appellant to establish is the existence of a duty owed to her by John Young of which he committed a breach. As between John Young and the driver of the motor-car, John Young was admittedly negligent, in that he was in breach of the duty which he owed to him of not driving, while passing the stationary tramcar, at such a speed as would prevent him from

(1) [1925] 1 K. B. 141.
(2) Ibid. 156.
(3) [1939] 1 K. B. 394.

pulling up in time to avoid a collision with any vehicle which might come across the front of the tramcar from Colinton Road into Glenlockhart Road, but it by no means follows that John Young owed any duty to the appellant. The facts relevant to this question seem to me to be these: The appellant was not in any way physically involved in the collision. She had been a passenger in the tramcar which had come from the direction of the city and had stopped some fifteen or sixteen yards short of the point of collision. She was standing in the road on the off-side of the tramcar (which was at rest), with her back to the driver's platform. The front part of the tramcar was between her and the colliding vehicles. She was frightened by the noise of the collision, but she had no reasonable fear of immediate bodily injury to herself.

In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double rôle. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, i.e., to the question of compensation not to culpability, but it is also relevant in testing the existence of a duty as the foundation of the alleged negligence, i.e., to the question of culpability not to compensation. It will be sufficient in this connexion to cite two passages from well known judgments. The first is from the judgment of Brett M.R. in *Heaven* v. *Pender* (1): "Whenever "one person is by circumstances placed in such a position with "regard to another that every one of ordinary sense who did "think would at once recognize that if he did not use ordinary "care and skill in his own conduct with regard to those circumstances he would cause danger of injury to the person or "property of the other, a duty arises to use ordinary care and "skill to avoid such danger." The second is from the speech of Lord Atkin in *Donoghue* v. *Stevenson* (2): "You must take "reasonable care to avoid acts or omissions which you can "reasonably foresee would be likely to injure your neighbour. "Who, then, in law is my neighbour? The answer seems to be "—persons who are so closely and directly affected by my act "that I ought reasonably to have them in contemplation as "being so affected when I am directing my mind to the acts "or omissions which are called in question." A man is not

(1) (1883) 11 Q. B. D. 503, 509. (2) [1932] A. C. 562, 580.

liable for negligence in the air. The liability only arises "where there is a duty to take care and where failure in that "duty has caused damage": see per Lord Macmillan in *Donoghue* v. *Stevenson* (1). In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the act which constitutes the alleged breach.

Can it be said that John Young could reasonably have anticipated that a person, situated as was the appellant, would be affected by his proceeding towards Colinton at the speed at which he was travelling? I think not. His road was clear of pedestrians. The appellant was not within his vision, but was standing behind the solid barrier of the tramcar. His speed in no way endangered her. In these circumstances I am unable to see how he could reasonably anticipate that, if he came into collision with a vehicle coming across the tramcar into Glenlockhart Road, the resultant noise would cause physical injury by shock to a person standing behind the tramcar. In my opinion, he owed no duty to the appellant, and was, therefore, not guilty of any negligence in relation to her.

The duty of the driver of a motor vehicle in a highway has often been stated in general terms which, if literally interpreted, would include persons to whom the driver would obviously owe no duty at all, as for instance, persons using the highway but who having passed the vehicle are well on their way in the opposite direction. I think the true view was correctly expressed by Lord Jamieson in the present case when he said (2): "No doubt the duty of a driver is to use proper care not to "cause injury to persons on the highway or in premises "adjoining the highway, but it appears to me that his duty "is limited to persons so placed that they may reasonably "be expected to be injured by the omission to take such "care." The appellant was not, in my opinion, "so placed," or (to use the language of Lord Mackay (3)) she has "failed "to bring herself into any relationship to the cyclist which "infers a duty of care in driving owed by him towards her." On this ground the interlocutor appealed against should be affirmed, and the appeal dismissed.

My Lords, we heard a lengthy argument addressed to the questions whether *Hambrook* v. *Stokes Brothers* (4) was rightly

(1) [1932] A. C. 562, 618.
(2) 1941 S. C. 395, 429.
(3) Ibid. 422.
(4) [1925] 1 K. B. 141.

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decided, and, if so, whether the decision was in accordance with the law of Scotland as expounded in the numerous Scottish decisions cited to us. In the view which I have taken of the present case it is unnecessary to express a final view upon these questions. I will only say that, as at present advised, I see no reason why the laws of the two countries should differ in this respect, and I prefer the dissenting judgment of Sargant L.J. to the decision of the majority in *Hambrook* v. *Stokes Brothers* (1). It was said by counsel for the appellant that it was impossible to affirm the interlocutor under appeal without disapproving of the decision in *Hambrook* v. *Stokes Brothers* (1). I do not agree, for the simple reason that in that case the negligence, which was the basis of the claim, was admitted, whereas in the present case we are affirming because John Young was guilty of no negligence in relation to the appellant.

LORD MACMILLAN. My Lords, it is established that the appellant suffered in her health and in her ability to do her work by reason of the shock which she sustained when a motor-cycle ridden by the deceased John Young collided with a motor-car in her vicinity. The question for decision is whether the respondent, as representing the late John Young, can be rendered accountable at law for what the appellant has suffered.

It is no longer necessary to consider whether the infliction of what is called mental shock may constitute an actionable wrong. The crude view that the law should take cognizance only of physical injury resulting from actual impact has been discarded, and it is now well recognized that an action will lie for injury by shock sustained through the medium of the eye or the ear without direct contact. The distinction between mental shock and bodily injury was never a scientific one, for mental shock is presumably in all cases the result of, or at least accompanied by, some physical disturbance in the sufferer's system. And a mental shock may have consequences more serious than those resulting from physical impact. But in the case of mental shock there are elements of greater subtlety than in the case of an ordinary physical injury and these elements may give rise to debate as to the precise scope of legal liability.

Your Lordships have here to deal with a common law action founded on negligence. The appellant's plea is that she has "sustained loss, injury and damage through the fault "of the said John Young" and that she is "entitled to "reparation therefor out of his estate." She can recover damages only if she can show that in relation to her the late John Young acted negligently. To establish this she must show that he owed her a duty of care which he failed to observe, and that, as a result of this failure in duty on his part, she suffered as she did. As was said by Lord Kinnear: "A man "cannot be charged with negligence if he has no obligation to "exercise diligence": *Kemp & Dougall* v. *Darngavil Coal Co., Ld.* (1), quoted by Lord Thankerton in *Donoghue* v. *Stevenson* (2). In dealing with a case of alleged negligence it is thus necessary to ascertain, first, what in the circumstances was the duty of the person alleged to be in fault, and, second, to whom that duty was owed.

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(1) [1925] 1 K. B. 141.

The late John Young was riding a motor bicycle in an Edinburgh street. What duty then was incumbent on him? It cannot be better or more succinctly put than it was by Lord Jamieson in the Second Division in the present case (3), when he said that "the duty of a driver is to use proper care "not to cause injury to persons on the highway or in premises "adjoining the highway." Proper care connotes avoidance of excessive speed, keeping a good look-out, observing traffic rules and signals and so on. Then, to whom is the duty owed? Again I quote and accept Lord Jamieson's words: "To "persons so placed that they may reasonably be expected to "be injured by the omission to take such care." The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed.

There is no absolute standard of what is reasonable and probable. It must depend on circumstances and must always be a question of degree. In the present instance the late John Young was clearly negligent in a question with the occupants of the motor-car with which his cycle collided. He was driving at an excessive speed in a public thoroughfare and he ought to have foreseen that he might consequently collide with any vehicle which he might meet in his course, for such an occurrence may reasonably and probably be

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(1) 1909 S. C. 1314, 1319.

(2) [1932] A. C. 562, 602.

(3) 1941 S. C. 395, 429.

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expected to ensue from driving at a high speed in a street. But can it be said that he ought further to have foreseen that his excessive speed, involving the possibility of collision with another vehicle, might cause injury by shock to the appellant ? The appellant was not within his line of vision, for she was on the other side of a tramcar which was standing between him and her when he passed and it was not until he had proceeded some distance beyond her that he collided with the motor-car. The appellant did not see the accident and she expressly admits that her " terror did not involve any element of "reasonable fear of immediate bodily injury to herself." She was not so placed that there was any reasonable likelihood of her being affected by the cyclist's careless driving. In these circumstances I am of opinion with the majority of the learned judges of the Second Division that the late John Young was under no duty to the appellant to foresee that his negligence in driving at an excessive speed and consequently colliding with a motor-car might result in injury to her, for such a result could not reasonably and probably be anticipated. He was, therefore, not guilty of negligence in a question with the appellant.

That is sufficient for the disposal of the case and absolves me from considering the question whether injury through mental shock is actionable only when, in the words of Kennedy *J.*, the shock arises from a reasonable fear of immediate personal injury to oneself (*Dulieu* v. *White & Sons* (1)), which was admittedly not the case in the present instance. It also absolves me from considering whether, if the late John Young neglected any duty which he owed to the appellant—which, in my opinion, he did not—the injury of which she complains was too remote to entitle her to damages. I shall observe only that the view expressed by Kennedy J. has in Scotland the support of a substantial body of authority, although it was not accepted by the Court of Appeal in England in *Hambrook* v. *Stokes Brothers* (2), notwithstanding a powerful dissent by Sargant L.J. This House has not yet been called upon to pronounce on the question either as a matter of Scots law or as a matter of English law, and I reserve my opinion on it. The decision in *Owens* v. *Liverpool Corporation* (3), if it is the logical consequence of *Hambrook's* case (2), shows how far-reaching is the principle involved.

(1) [1901] 2 K. B. 669, 682.
(2) [1925] 1 K. B. 141.
(3) [1939] 1 K. B. 394.

On the second point it was argued that once an act is properly characterized as negligent, that is to say, as a breach of a duty of care owed to a particular person, then the party at fault is liable to that person for everything that directly follows from the negligent act whether or not it could have been foreseen as a natural and probable result of the negligent act. For this *In re Polemis and Furness, Withy & Co., Ld.* (1) was cited. Whether the law there laid down is consonant with the law of England it will be for this House to pronounce when the occasion arises. As at present advised, I doubt if it is the law of Scotland, and I could cite ample authority to the contrary, but, again, this is not a point which I deem it necessary to discuss now. I am, accordingly, for affirming the decision of the Second Division of the Court of Session and dismissing the appeal.

LORD WRIGHT. My Lords, that damage by mental shock may give a cause of action is now well established and is not disputed in this case, but as Phillimore J. pointed out in his admirable judgment in *Dulieu* v. *White & Sons* (2), the real difficulty in questions of this kind is to decide whether there has been a wrongful act or breach of duty on the part of the defendant vis-à-vis the plaintiff. That being the prior question, if it is answered against the plaintiff the matter is concluded. I shall, therefore, consider that issue in the first place.

The appellant, according to the finding of the Lord Ordinary, suffered substantial damage, and suffered it owing to the conduct of the cyclist, but the infliction of damage on a plaintiff does not in itself give a cause of action. Damage due to the legitimate exercise of a right is not actionable, even if the actor contemplates the damage. It is damnum absque injuria. The damage must be attributable to the breach by the defendant of some duty owing to the plaintiff. Where there is no immediate physical action by the defendant on the plaintiff, but the action operates at a distance, or is not direct, or is what is called nervous shock, difficulties arise in ascertaining if there has been a breach of duty. Some cases are comparatively simple. Thus, in *Smith* v. *London and South Western Ry. Co.* (3), Blackburn J. makes some observations, obvious enough but not to be forgotten: " If

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(1) [1921] 3 K. B. 560.
(2) [1901] 2 K. B. 669, 685.
(3) (1870) L. R. 6 C. P. 14, 22.

"the negligence were once established, it would be no answer "that it did much more damage than was expected. If a man "fires a gun across a road where he may reasonably anticipate "that persons will be passing, and hits someone, he is guilty "of negligence, and liable for the injury he has caused; but "if he fires in his own wood, where he cannot reasonably "anticipate that anyone will be, he is not liable to anyone "whom he shoots, which shows that what a person may "reasonably anticipate is important in considering whether "he has been negligent." Much to the same effect Scrutton L.J. in the *Polemis* case (1) said: "To determine whether an act "is negligent, it is relevant to determine whether any reasonable person would foresee that the act would cause damage; "if he would not, the act is not negligent . . . . Once the "act is negligent, the fact that its exact operation was not "foreseen is immaterial." These simple propositions are as much a part of the law of Scotland as of England. It would be, I repeat, a grievous defect if in a branch of law, of modern development like that of negligence, and one affecting the ordinary life of the people, there were a divergence in principle between the two laws, but, having regard to the views on this point expressed by Lord Mackay and Lord Jamieson, I take it that they accept the test. Lord Jamieson (2) quotes the well-known aphorism of Lord Atkin in *Donoghue* v. *Stevenson* (3), a Scottish case: "You must take reasonable care to avoid "acts or omissions which you can reasonably foresee would "be likely to injure your neighbour." And "neighbour" means "persons so closely and directly affected by my act "that I ought reasonably to have them in contemplation as "being so affected when I am directing my mind to the acts "or omissions which are called in question." I do not read Lord Atkin's language in a similar context in *Hambrook* v. *Stokes Brothers* (4) as going beyond what he said in *Donoghue* v. *Stevenson* (3).

This general concept of reasonable foresight as the criterion of negligence or breach of duty (strict or otherwise) may be criticized as too vague, but negligence is a fluid principle, which has to be applied to the most diverse conditions and problems of human life. It is a concrete, not an abstract, idea. It has to be fitted to the facts of the particular case. Willes J. defined it as absence of care according to the circumstances:

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(1) [1921] 3 K. B. 560, 577.
(2) 1941 S. C. 395, 429.
(3) [1932] A. C. 562, 580.
(4) [1925] 1 K. B. 141, 156.

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Vaughan v. *Taff Vale Ry. Co.* (1). It is also always relative to the individual affected. This raises a serious additional difficulty in the cases where it has to be determined, not merely whether the act itself is negligent against someone, but whether it is negligent vis-à-vis the plaintiff. This is a crucial point in cases of nervous shock. Thus, in the present case John Young was certainly negligent in an issue between himself and the owner of the car which he ran into, but it is another question whether he was negligent vis-à-vis the appellant. In such cases terms like "derivative" and "original" and "primary" and "secondary" have been applied to define and distinguish the type of the negligence. If, however, the appellant has a cause of action it is because of a wrong to herself. She cannot build on a wrong to someone else. Her interest, which was in her own bodily security, was of a different order from the interest of the owner of the car. That this is so is also illustrated by cases such as have been called in the United States "rescue" or "search" cases. This type has been recently examined and explained in the Court of Appeal in *Haynes* v. *Harwood* (2), where the plaintiff, a police constable, was injured in stopping runaway horses in a crowded street in which were many children. His act was due to his mental reaction, whether instinctive or deliberate, to the spectacle of others' peril. Maugham L.J. in the Court of Appeal approved the language used by the trial judge, Finlay J. (3), when he held that to leave the horses unattended was a breach of duty not only to any person injured by being run over (in fact, no one was so injured), but also to the constable. Finlay J.'s words were: "It "seems to me that if horses run away it must be quite obviously "contemplated that people are likely to be knocked down. "It must also, I think, be contemplated that persons will "attempt to stop the horses and try to prevent injury to life "or limb." I may also refer to the admirable judgment of Cardozo J. in the New York Court of Appeals, in *Wagner* v. *International Ry. Co.* (4), a "search" case, which is to the same effect. This again shows how the ambit of the persons affected by negligence or misconduct may extend beyond persons who are actually subject to physical impact. There may indeed be no one injured in a particular case by actual impact, but still a wrong may be committed to anyone who suffers nervous shock or is injured in an act of rescue. The man who negligently allows a horse to bolt, or a car to run at large down a steep street, or a savage beast to escape is committing a breach of duty towards every person who comes within the range of foreseeable danger, whether by impact or shock, but, if there is no negligence or other default, there can be no liability for either direct impact or for nervous shock. Thus, if, owing to a latent defect or some mischance for which no one is liable, a terrifying collision occurs between vehicles on the road, and the occupants are killed or suffer horrible injuries, a bystander who suffers shock, whether through personal fear or merely horror, would have no action. On somewhat similar principles may be solved the problem of the old lady at Charing Cross, who suffers shock because she narrowly escapes being run over. She cannot claim damages if the driver is driving carefully, whether he hits her or not.

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(1) (1860) 5 H. & N. 679, 688.
(2) [1935] 1 K. B. 146, 163.
(3) [1934] 2 K. B. 240, 247.
(4) (1921) 232 N. Y. 176.

The present case, like many others of this type, may, however, raise the different question whether the appellant's illness was not due to her peculiar susceptibility. She was eight months gone in pregnancy. Can it be said, apart from everything else, that it was likely that a person of normal nervous strength would have been affected in the circumstances by illness as the appellant was? Does the criterion of reasonable foresight extend beyond people of ordinary health or susceptibility, or does it take into account the peculiar susceptibilities or infirmities of those affected which the defendant neither knew of nor could reasonably be taken to have foreseen? Must the manner of conduct adapt itself to such special individual peculiarities? If extreme cases are taken, the answer appears to be fairly clear, unless, indeed, there is knowledge of the extraordinary risk. One who suffers from the terrible tendency to bleed on slight contact, which is denoted by the term " a bleeder," cannot complain if he mixes with the crowd and suffers severely, perhaps fatally, from being merely brushed against. There is no wrong done there. A blind or deaf man who crosses the traffic on a busy street cannot complain if he is run over by a careful driver who does not know of and could not be expected to observe and guard against the man's infirmity. These questions go to "culpability, not compensation": as Bankes L.J. said in the *Polemis* case (1). No doubt, it has long ago been stated and often restated that if the wrong is established the wrongdoer

(1) [1921] 3 K. B. 560, 571.

must take the victim as he finds him. That, however, is only true, as the *Polemis* case (1) shows, on the condition that the wrong has been established or admitted. The question of liability is anterior to the question of the measure of the consequences which go with the liability. That was the second point, decided not for the first time, but merely reiterated in the *Polemis* case (1). It must be understood to be limited, however, to " direct " consequences to the particular interest of the plaintiff which is affected. *Liesbosch* (*Owners*) v. *Edison* (*Owners*) (2) illustrates this limitation.

What is now being considered is the question of liability, and this, I think, in a question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility. This, it may be said, is somewhat vague. That is true, but definition involves limitation which it is desirable to avoid further than is necessary in a principle of law like negligence which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of the plaintiff's extraordinary susceptibility, if unknown to the defendant, would in effect make him an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or of the judge decides. I should myself be disposed, as at present advised, to say that it should have stopped short of judgment for the plaintiff in *Owens* v. *Liverpool Corporation* (3). The particular susceptibility there was to my mind beyond any range of normal expectancy or of reasonable foresight. I cannot, however, forbear referring to a most important case in the High Court of Australia, *Chester* v. *Waverley Corporation* (4), where the court by a majority held that no duty was made out. The dissenting judgment of Evatt J. will demand the consideration of any judge who is called on to consider these questions.

But when I apply the considerations which I have been

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(1) [1921] 3 K. B. 560, 571.
(2) [1933] A. C. 449.
(3) [1939] 1 K. B. 394.
(4) (1939) 62 C. L. R. 1.

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discussing to the present appeal, I come to the conclusion that the judgment should be affirmed. The case is peculiar, as, indeed, though to a varying extent, all these cases are apt to be. There is no dispute about the facts. Upon these facts, can it be said that a duty is made out, and breach of that duty, so that the damage which is found is recoverable? I think not. The appellant was completely outside the range of the collision. She merely heard a noise, which upset her, without her having any definite idea at all. As she said: "I just got into a pack of nerves and I did not know whether "I was going to get it or not." She saw nothing of the actual accident, or, indeed, any marks of blood until later. I cannot accept that John Young could reasonably have foreseen, or, more correctly, the reasonable hypothetical observer could reasonably have foreseen, the likelihood that anyone placed as the appellant was, could be affected in the manner in which she was. In my opinion, John Young was guilty of no breach of duty to the appellant, and was not in law responsible for the hurt she sustained. I may add that the issue of duty or no duty is, indeed, a question for the court, but it depends on the view taken of the facts. In the present case both courts below have taken the view that the appellant has, on the facts of the case, no redress, and I agree with their view.

This conclusion disposes of the present case and makes it unnecessary to decide the difficult question which was the subject of lengthy argument and elaborate citation of authorities before your Lordships. I have carefully considered all the authorities cited, and it may well be that some day this House will have to examine the exact meaning and effect of what Kennedy J. said in *Dulieu* v. *White & Sons* (1). He was, he said, inclined to think that there was at least one limitation: "The shock, where it operates through the mind, "must be a shock which arises from a reasonable fear of "immediate personal injury to oneself." That statement, if meant to lay down a rigid rule of law, has been overruled by the Court of Appeal in *Hambrook* v. *Stokes Brothers* (2), which now lays down the English law unless it is set aside by this House. As at present advised, I agree with that decision. Kennedy J.'s dictum, if intended to lay down a rigid limitation, is not, I think, in accordance with principle or with cases like *Wilkinson* v. *Downton* (3). It finds no support in the judgment

(1) [1901] 2 K. B. 669, 675.
(2) [1925] 1 K. B. 141.
(3) [1897] 2 Q. B. 57.

of Phillimore J., who implicitly lays down a wider principle, but as I may some day have to decide the question in this House, I prefer to express here no final opinion. If, indeed, the Inner House, having to determine a case like *Hambrook* v. *Stokes Brothers* (1), takes a different view, this House may have to decide between the conflicting views of the two appellate courts, because in a modern and developing branch of law like that of negligence, the law adopted by the two courts should, if possible, be uniform. That, however, is a matter for the future. Kennedy J.'s dictum does indeed give a rough criterion which may be useful in some cases, but, always assuming that the wrongful act is established, the damage to be proved is physical injury due to nervous shock. Modern medical science may, perhaps, show that the nervous shock is not necessarily associated with any particular mental ideas. The worst nervous shock may for the moment at least paralyse the mind, but I do not pursue these questionings on this occasion. I concur in the motion proposed.

LORD PORTER (read by LORD WRIGHT). My Lords, this case raises a question which has been much canvassed during the period beginning with *Victorian Rys. Commissioners* v. *Coutlas* (2) and ending with *Haynes* v. *Harwood* (3). The problem to be determined is whether the driver of a vehicle who through his negligence causes physical injury to one person is responsible for any, and (if so) what, consequent emotional injury to another, at any rate if that emotion results in physical illness, or, perhaps, it may be put more generally by asking to whom and for what effects of his negligence a tortfeasor is liable.

In considering the question it is I think essential to bear in mind the distinction drawn in *In re Polemis and Furness, Withy & Co., Ld.* (4), a distinction which is perhaps best expressed in the words of Channell B., taken from *Smith* v. *London and South Western Ry. Co.* (5), which are quoted by Warrington L.J. (6): "Where there is no direct evidence "of negligence, the question what a reasonable man might "foresee is of importance in considering the question whether "there is evidence for the jury of negligence or not . . . . but "when it has been once determined that there is evidence of

(1) [1925] 1 K. B. 141.
(2) (1887) 13 App. Cas. 222.
(3) [1935] 1 K. B. 146.
(4) [1921] 3 K. B. 560.
(5) (1870) L. R. 6 C. P. 14, 21.
(6) [1921] 3 K. B. 560, 574.

"negligence, the person guilty of it is equally liable for its "consequences, whether he could have foreseen them or not." For the present I think it immaterial to consider whether the second proposition is accurate or not. Before any decision on quantum of damage is required it has first to be determined whether the cyclist was guilty of any negligence towards the appellant. "The law takes no cognizance of carelessness in "the abstract. It concerns itself with carelessness only where "there is a duty to take care and where failure in that duty "has caused damage": per Lord Macmillan in *Donoghue* v. *Stevenson* (1). It is not enough to say that the cyclist was guilty of negligence towards some one. Admittedly he was, and I will assume without deciding that for all damages, whether expected or unexpected, to that person he was liable. But was he, therefore, liable for all damages of whatsoever nature to all other persons affected by his negligence whether he could reasonably foresee that he would injure them or not?

For the present purpose I am also prepared to assume without deciding that all types of injury are included, physical, mental and emotional, and that once a defender is shown to be negligent towards a pursuer he is liable for all such consequences. Does it follow from this assumption that the defender is guilty of negligence towards all persons on the highway because conceivably they might in other circumstances have suffered physical damage, and, among others, towards those who were never in personal danger themselves or in fear for their children or even for third persons, but were merely emotionally disturbed because some person was in fact injured and because they heard the crash or saw the result of the accident?

In *Dulieu* v. *White & Sons* (2), Kennedy J. thought that only those in reasonable fear for their own safety could recover, not, I think, because he thought the damage was too remote but because he thought that unless there was such fear no legal duty was involved. As he said (3): "A has, I conceive, "no legal duty not to shock B's nerves by the exhibition of "negligence towards C or towards the property of B or "C . . . . In *Smith* v. *Johnson & Co.* (4) a man was killed "by the defendants' negligence in the sight of the plaintiff, "and the plaintiff became ill, not from the shock produced "by fear of harm to himself, but from the shock of seeing another

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(1) [1932] A. C. 562, 618.
(2) [1901] 2 K. B. 669.
(3) [1901] 2 K. B. 669, 675.
(4) (1897) Unrep.

"person killed. The court held that this harm was too "remote a consequence of the negligence. I should myself, "as I have already indicated, have been inclined to go a step "further, and to hold upon the facts in *Smith* v. *Johnson & "Co.* (1), that as the defendant neither intended to affect the "plaintiff injuriously nor did anything which could reasonably "or naturally be expected to affect him injuriously, there was "no evidence of any breach of legal duty towards the plaintiff "or in regard to him of that absence of care according to the "circumstances which Willes J. in *Vaughan* v. *Taff Vale Ry. "Co.* (2) gave as a definition of negligence." So Phillimore J. in the same case after suggesting (3): "It may be (I do not "say that it is so) that a person venturing into the streets "takes his chance of terrors. If not fit for the streets at "hours of crowded traffic, he or she should not go there," said (4): "The difficulty in these cases is to my mind not one as "to the remoteness of the damage, but as to the uncertainty "of there being any duty." It is true that he does also envisage the possibility of liability for mental shock apart from fear of personal injury in the remark (5): "I think "there may be cases in which A owes a duty to B not to "inflict a mental shock on him or her, and that in such a case, "if A does inflict such a shock upon B, ... and physical damage "thereby ensues, B may have an action for the physical "damage, though the medium through which it has been "inflicted is the mind." But his previous remarks show that he would not necessarily include mental shock due to the sight of an accident in the streets.

In *Hambrook* v. *Stokes Brothers* (6), in which the plaintiff succeeded, negligence was admitted, and as Lord Atkin, then Atkin L.J., pointed out, such an admission can only mean an admission of negligence towards the plaintiff, but none of the lords justices who heard the case confined themselves to considerations founded on this fact. Bankes L.J. expressed himself thus (7): "What a man ought to have anticipated "is material when considering the extent of his duty. Upon "the authorities, as they stand, the defendant ought to have "anticipated that, if his lorry ran away down this narrow "street, it might terrify some woman to such an extent,

(1) (1897) Unrep.
(2) (1860) 5 H. & N. 679, 688.
(3) [1901] 2 K. B. 684.
(4) Ibid. 685.
(5) Ibid. 682.
(6) [1925] 1 K. B. 141, 156
(7) Ibid. 151.

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"through fear of some immediate bodily injury to herself, "that she would receive such a mental shock as would injure "her health," and he then goes on to assert that in his view no distinction can be drawn between the fear of a mother for her own safety and her fear for her children. He was careful to limit the scope of his decision to the facts of the case then under consideration and to confine his determination to cases where the claimant was in fear for his or her own personal safety or that of his or her children. Of *Smith* v. *Johnson & Co.* (1) he said (2): "It may well be that the duty of a "person to take care does not extend to a person in the position "of the plaintiff in *Smith* v. *Johnson & Co.* (1) or to the person "indicated as B in Kennedy J.'s illustration, and yet may "extend to a person in the position of the plaintiff's wife." Atkin L.J. said (3): "Apart from the admission in the "pleadings, I think that the cause of action is complete. The "duty of the owner of a motor-car in a highway is not a duty "to refrain from inflicting a particular kind of injury upon "those who are in the highway. If so, he would be an insurer. "It is a duty to use reasonable care to avoid injuring those "using the highway. It is thus a duty owed to all wayfarers, "whether they are injured or not. . . . . Further, the breach "of duty does not take place necessarily when the vehicle "strikes or injures the wayfarer. The negligent act or "omission may precede the act of injury. In this case it was "completed at the top of Dover Street, when the car was left "unattended." He continued (4): "In my opinion it is not "necessary to treat this cause of action as based upon a duty "to take reasonable care to avoid administering a shock to "wayfarers. The cause of action, as I have said, appears to "be created by breach of the ordinary duty to take reasonable "care to avoid inflicting personal injuries followed by damage, "even though the type of damage may be unexpected—namely, "shock. The question appears to be as to the extent of the "duty and not as to remoteness of damage." Sargant L.J. differed, and, like Kennedy J., would confine liability to cases of reasonable fear for personal safety but only because in his view the injury complained of could not reasonably have been anticipated, and, therefore, the defendant had broken no duty which he owed to the defendant. He said (5): "I should

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(1) (1897) Unrep.
(2) [1925] 1 K. B. 141, 150.
(3) Ibid. 156.
(4) Ibid. 158.
(5) Ibid. 162.

"prefer, with Kennedy J., to put it not on the ground that the "harm was too remote a consequence of the negligence, but on "(what is often practically equivalent) a consideration of the "extent of the duty of the defendant towards the plaintiff "and others on and near the highway. That is to say that, "as the defendant did not do anything which could reasonably "or naturally be expected to cause the harm in question to the "plaintiff, there was no evidence of any breach of duty towards "him for which the defendant could be rendered liable." In the result, the plaintiff succeeded.

A conclusion in favour of the plaintiff was also reached by the Court of Appeal in *Owens* v. *Liverpool Corporation* (1), in which the driver of a tram negligently ran into a hearse containing the body of a relative of the plaintiffs and was held liable to them in respect of illness caused by the shock of seeing the accident. The lords justices seem to have accepted the view that the driver ought to have anticipated that the result of his negligence might be to cause emotional distress to spectators of the consequent accident, and, therefore, was guilty of negligence towards any one physically affected by feelings induced by the sight presented to them. With all respect, I do not myself consider the Court of Appeal justified in thinking that the driver should have anticipated any injury to the plaintiffs as mere spectators or that he was in breach of any duty which he owed to them.

I have, however, dealt with both these cases, and particularly with *Hambrook* v. *Stokes Brothers* (2), somewhat at length because they show the high water mark reached in claims of the character now in question. It will be observed that in the earlier case all the lords justices were careful to point out that the vital problem was the extent of the duty and not the remoteness of damages—a view in which they were supported by the opinions of Kennedy and Phillimore JJ. in *Dulieu* v. *White & Sons* (3). With this view I agree, and I ask myself whether the cyclist in the present case owed any duty to the appellant.

In the case of a civil action there is no such thing as negligence in the abstract. There must be neglect of the use of care towards a person towards whom the defendant owes the duty of observing care, and I am content to take the statement of Lord Atkin in *Donoghue* v. *Stevenson* (4), as indicating the

(1) [1939] 1 K. B. 394.
(2) [1925] 1 K. B. 141, 156.
(3) [1901] 2 K. B. 669.
(4) [1932] A. C. 562, 580.

extent of the duty. "You must take," he said, "reasonable care "to avoid acts or omissions which you can reasonably foresee "would be likely to injure your neighbour. Who, then, in law is "my neighbour? The answer seems to be—persons who are "so closely and directly affected by my act that I ought "reasonably to have them in contemplation as being so affected "when I am directing my mind to the acts or omissions which "are called in question." Is the result of this view that all persons in or near the street down which the negligent driver is progressing are potential victims of his negligence? Though from their position it is quite impossible that any injury should happen to them and though they have no relatives or even friends who might be endangered, is a duty of care to them owed and broken because they might have been but were not in a spot exposed to the errant driving of the peccant car? I cannot think so. The duty is not to the world at large. It must be tested by asking with reference to each several complainant: Was a duty owed to him or her? If no one of them was in such a position that direct physical injury could reasonably be anticipated to them or their relations or friends normally I think no duty would be owed, and if, in addition, no shock was reasonably to be anticipated to them as a result of the defender's negligence, the defender might, indeed, be guilty of actionable negligence to others but not of negligence towards them. In the present case the appellant was never herself in any bodily danger nor reasonably in fear of danger either for herself or others. She was merely a person who, as a result of the action, was emotionally disturbed and rendered physically ill by that emotional disturbance. The question whether emotional disturbance or shock, which a defender ought reasonably to have anticipated as likely to follow from his reckless driving, can ever form the basis of a claim is not in issue. It is not every emotional disturbance or every shock which should have been foreseen. The driver of a car or vehicle, even though careless, is entitled to assume that the ordinary frequenter of the streets has sufficient fortitude to endure such incidents as may from time to time be expected to occur in them, including the noise of a collision and the sight of injury to others, and is not to be considered negligent towards one who does not possess the customary phlegm.

In *Hambrook* v. *Stokes Brothers* (1) the defendant's lorry

(1) [1925] 1 K. B. 141.

was left unattended and improperly braked at the top of a steep and narrow street with the engine running, with the result that it started off by itself and ran violently down the hill, putting the plaintiff in fear for the safety of her children whom she had just left and thereby causing a serious illness and ultimately her death. In such circumstances it might well be held that the negligence complained of was a potential danger to all those in the way, and that the careless driver should have foreseen the likelihood of actual or apprehended injury to anyone in the street down which the lorry might run and the possibility of illness being produced in a mother from fear that the run-away car would injure her children. The position of the respondent in the present case is more favourable. The rider of the cycle had not left it to career at its own will. He was always in control, and his negligence was not to all those in the highway but only to anyone turning or intending to turn in front of him into a side road. The appellant was not such a person and the only allegation of negligence which I can find in the condescendence is not towards her but, as I understand it, towards traffic proceeding across or at any rate down the road towards the cyclist. So far as the appellant is concerned she complains of nothing but the disturbance caused by an accident to the cyclist himself and in her claim confines her allegation to a general averment against him of negligence resulting in a collision with a motor-car. She in no way connects that negligence with herself except by the assertion that she sustained a very severe shock to her nervous system and by an amendment assented to in the Inner House expressly repudiates any fear of personal injury. The Lord Ordinary, if I understand him aright, was nevertheless prepared to treat the case on the basis that the appellant had been put in fear of bodily injury to herself. "At the best for her," he said (1), "it can be said "that the shock arose from a fear of immediate bodily injury "to herself, but only from a fear which had no rational basis, "or in other words, an unreasoned fear, and, as the whole "facts disclose, an unreasonable fear." In your Lordships' House the appellant's representatives preferred to rest their case on the terms of the amended plea and confined their arguments to considerations based on an averment that the appellant was not put in fear of injury to herself or others but was only emotionally disturbed and rendered physically

(1) 1941 S. C. 395, 406

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ill by the crash and possibly by the sight of the injured man. This limited contention was, no doubt, prudently adopted since, although the Lord Ordinary had found that any fear of personal injury was unreasoned and unreasonable, he had made no similar finding as to fear engendered by the crash or sight. In order, however, to establish a duty towards herself, the appellant must still show that the cyclist should reasonably have foreseen emotional injury to her as a result of his negligent driving, and, as I have indicated, I do not think she has done so.

If I am right in thinking that the appellant has established no duty towards herself in the cyclist and no breach of any duty, she must fail unless it can be said that there is some principle in the law of Scotland, which is not to be found in the law of England, under which she can recover. I should be loth to think that there is any difference between the principles adopted in the two systems, nor can I find in the cases quoted any decision or even dicta which would warrant a decision in favour of the appellant in the present instance. Taking the cases in the order in which they were quoted the claim in *Cooper* v. *Caledonian Ry. Co.* (1) was based on an allegation of fear of personal physical injury and even in that case the allegation was only held to be relevant if it appeared that the fright resulting from the negligent act might reasonably arise in a mind of average intelligence and strength, i.e., it must not be unreasoned and unreasonable. *Gilligan* v. *Robb* (2) contained an averment of negligence and fear of physical injury. In *Ross* v. *Glasgow Corporation* (3), in which a tramcar was driven negligently on the wrong line but drawn up slowly and carefully short of another car, it was held that fright thereby caused was not naturally or probably caused by the negligent act and that the defenders had no duty to anticipate such a consequence. *Brown* v. *Glasgow Corporation* (4), and *Currie* v. *Wardrop* (5), both led to considerable divergence of opinion, and in each the conclusion that a cause of action existed was reached by a majority of three against two. In the former there was an allegation of fear of personal injury and a finding by the court that that fear was reasonable. In the latter a man and his fiancée walking together were knocked down by a negligent motor driver. The man was killed and

(1) (1902) 4 F. 880.
(2) 1910 S. C. 856.
(3) 1919 S. C. 174.
(4) 1922 S. C. 527.
(5) 1927 S. C. 538.

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the woman suffered physically from consequent nervous shock partly due to the accident to herself and partly to fear for the safety of her companion. Undoubtedly, there was in that case a duty to the pursuer (the woman) and a breach of that duty, and the decision of the majority was due to that fact coupled with the impossibility of distinguishing between the physical injury due to each type of shock. *A* v. *B's Trustees* (1), in which a lodger committed suicide in the lodgings he had hired and both did some material damage and administered a nervous shock to his landladies may be explained as founded on contract or on the fact that the material damage might have been anticipated. Finally, in *Walker* v. *Pitlochry Motor Co.* (2), the pursuer was held entitled to recover in respect of the physical consequences of shock occasioned by the sight of injury caused to a near relative, shock which it was held might reasonably have been anticipated as a result of the negligent act. To the same effect is the Irish case of *Bell* v. *Great Northern Ry. Co. of Ireland* (3), in which illness due to reasonable apprehension of personal injury due to the defendants' negligence was held to give a cause of action. These cases are, at any rate, no more favourable to the appellant's contention than those decided in England. In all three countries, no doubt, shock occasioned by deliberate action affords a valid ground of claim (see *Wilkinson* v. *Downton* (4) and *Janvier* v. *Sweeney* (5)), and so, I think, does shock occasioned by reasonable apprehension of injury to oneself or others, at any rate, if those others are closely connected with the claimant. What is reasonable may give rise to some difference of opinion, but whether illness due to shock which might reasonably have been anticipated as the result of injury to others can or cannot form the basis of a successful claim need not now be considered. No exceptionally loud noise or particularly gruesome sight is alleged or any circumstance suggesting that the cyclist should have anticipated he would cause a shock to the appellant.

On the ground that there never was any duty owed by the cyclist to the appellant or breach of such a duty, I should dismiss the appeal. In so deciding, I believe I am following the reasoning and conclusion of the Lord Ordinary as well as

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(1) 13 Sc. L. T. 830.
(2) 1930 S. C. 565.
(3) 26 L. R. Ir. 428.
(4) [1897] 2 Q. B. 57.
(5) [1919] 2 K. B. 316.

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those of the majority in the Inner House, with whose opinions I agree.

Appeal dismissed.

Solicitors for appellant: *Botterell & Roche, for Boyd, Jameson & Young, W.S., Edinburgh.*

Solicitors for respondent: *Berrymans, for Dove, Lockhart & Smart, S.S.C., Edinburgh.*

[HOUSE OF LORDS.]

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June 9, 11, 12; *Aug.* 6.

DIGBY . . . . APPELLANT;

AND

GENERAL ACCIDENT FIRE AND LIFE ASSURANCE CORPORATION, LIMITED } RESPONDENTS.

Insurance (Motor)—Third-party liability—Policy issued by respondents to cover policyholder—Extension "to indemnify in like manner any "person whilst driving . . . . on the order or with the permission "of the policyholder"—Extended cover "subject to the terms, "exceptions and conditions of this policy in so far as they can apply" —Collision—Damages recovered by policyholder against authorized driver for personal injuries—Claim by authorized driver to be indemnified under policy.

By s. 2 (1.) of a policy of insurance the respondents agreed to indemnify the policyholder against all sums which the policyholder should "become legally liable to pay in respect of any "claim by any person," including passengers in the motor-car described in the schedule to the policy, for loss of life or accidental bodily injury caused by, through, or in connexion with the motor-car. By s. 2 (3.) of the policy: "The insurance under "this section" [third-party liability] "shall also extend to "indemnify in like manner any person whilst driving . . . . on "the order or with the permission of the policyholder, provided " . . . . that such person shall, as though he were the policy-"holder, observe, fulfil and be subject to the terms, exceptions "and conditions of this policy in so far as they can apply." The policyholder, while being driven in her motor-car by the appellant, her chauffeur, was injured in a collision between it and another vehicle, and she was awarded damages for negligence against the appellant:—

Held (Viscount Simon L.C. and Viscount Maugham dissenting),

**Present:* VISCOUNT SIMON L.C., VISCOUNT MAUGHAM, LORD ATKIN, LORD WRIGHT and LORD PORTER.

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that the appellant was entitled to be indemnified by the respondents in respect of the sum so payable by him to the policyholder.

Decision of the Court of Appeal [1940] 2 K. B. 226 reversed.

APPEAL from the Court of Appeal.

A policy of insurance on a standard form of motor insurance policy, known as "The 'General' European Travel Comprehensive Automobile Policy" and dated October 27, 1936, was issued by the respondents, General Accident Fire and Life Assurance Corporation, Ld., to Miss Merle Oberon (Estelle Merle O'Brien Thompson), described therein as "the policyholder." The insurance was for a period of twelve months from November 8, 1936, to November 8, 1937, and was in respect of a motor-car described in the schedule to the policy as a 37 h.p. Buick limousine. The policy began: "Whereas the policyholder ". . . . has made . . . . a written proposal . . . . which it is hereby "agreed shall be the basis of the contract and be considered "as incorporated herein. Now this policy witnesseth that in "consideration of the payment to the corporation of the "premium stated in the schedule hereto in respect of the period "set forth in the schedule . . . . the corporation will, subject to "the terms, exceptions and conditions contained herein, and "of any endorsement hereon, indemnify the policyholder in "respect of any automobile described in the schedule against" the losses and liabilities set out. The policy was divided into six sections described in the margin respectively as: 1. "Loss or damage." 2. "Third-party liability." 3. "Accidents to policyholder." 4. "Medical expenses." 5. "Towage." 6. "Free legal defence." Sect. 1 provided for indemnity against loss of or damage to the motor-car "and/or tyres, "lamps, and accessories (excluding radio installations) attached "thereto" from certain specified causes. By s. 2 the assured was indemnified against payment of: "(1.) All sums which the "policyholder shall become legally liable to pay in respect "of any claim by any person (including passengers in the "automobile) for loss of life or accidental bodily injury or "damage to property (including animals) caused by, through, "or in connexion with such automobile, and in addition the "law costs payable in connexion with such claim when "incurred with the consent of the corporation. (2.) The "policyholder will also be indemnified hereunder whilst "personally driving a private automobile not belonging to "him and not hired to him under a hire purchase agreement "provided the policyholder's own automobile is not in use "at the same time and provided that there is no other insurance "in force in respect of such other automobile whereby the "policyholder may be indemnified. (3.) The insurance under "this section shall also extend to indemnify in like manner any "person whilst driving any automobile described in the "schedule hereto on the order or with the permission of the "policyholder, provided there is no other insurance subsisting "under which such person may be indemnified, and that "such person shall as though he were the policyholder "observe fulfil and be subject to the terms, exceptions and "conditions of this policy in so far as they can apply; provided "also that such person is a competent driver and holds a "licence to drive such automobile or has held and is not "disqualified for holding or obtaining such a licence, and has "not been convicted of driving to the danger of the public "or of any criminal charge in connexion with the driving "of an automobile or been declined for automobile insurance "by any insurance company or underwriter. . . . . Subject to "the terms, exceptions and conditions of this policy the "corporation will indemnify any person using in Great Britain "an automobile in respect of which indemnity is provided "under this policy against liability under s. 16 of the Road "Traffic Act, 1934, to pay for emergency treatment of injuries "caused by or arising out of the use of such automobile. "Provided that the corporation shall not be liable in respect "of: (*a*) death of or bodily injury to any person where "such death or injury arises out of and in the course of the "employment of such person by the policyholder, (*b*) damage "to property belonging to or held in trust by or in the custody "or control of the policyholder or any member of his family "or his household or being conveyed in the automobile . . . ." Sect. 3 provided for certain "benefits" payable in the event of death on certain specified injuries of a very serious nature being suffered by the policyholder. The conditions of the policy dealt with (1.) notices of accident or loss; (2.) claims and legal proceedings and their conduct; (3.) payment of premiums; (4.) reasonable precautions to safeguard the motor-car; (5.) cancellation of the policy; (6.) contribution if there was another insurance; (7.) care in the selection of drivers; (8.) reference to arbitration of any difference between the policyholder and the respondents; and (9.) disclaimer of liability. In the proposal form, under the title "Third-party "indemnity. Public liability and property damage," the nature of the indemnity was described as: "Unlimited "indemnity in respect of claims by the public (including "passengers, subject to exclusions) for personal injury or "damage to property against: (1.) the policyholder or his "personal representative, (2.) any person driving on the "policyholder's order or with his permission, or his personal "representative if not entitled to indemnity under any other "policy . . . . Liability for hospital expenses under Road Traffic "Acts, 1930 to 1934 (Great Britain). Liability for emergency "treatment in accordance with s. 16 of the Road Traffic "Act, 1934 (Great Britain). Exclusions: (*a*) death or bodily "injury to any person where such death or injury arises out "of and in the course of the employment of such person by the "policyholder, (*b*) damage to property belonging to or held in "trust by or in the custody or control of the policyholder or "any member of his family or his household or being conveyed "in the automobile." The damage insured against was set out under the title: "Accidental damage to insured auto-"mobile." The amounts payable on death or injury suffered by the policyholder were set out under the title "Accidents "to owner."

On March 16, 1937, while the policyholder was being driven in the motor-car by her chauffeur, Sidney Digby, the appellant, there was a collision with another motor-car in which she sustained severe personal injury, but not any of the injuries specified in s. 3 of the policy. She brought an action in the High Court of Justice against the owner and the driver of that motor-car, alleging that the accident was caused by the negligence of the driver. Before the trial of the action the appellant was added as a defendant, the claim against him being on the alternative ground that it was his negligence which caused the accident. At the trial on May 4, 1938, du Parcq J. found that both drivers were to blame and judgment was entered for the original defendants, on the ground of the contributory negligence of the appellant, and against the appellant for 5000*l*. damages and 693*l*. 1*s*. 9*d*. costs. The amount of damages was based chiefly on the policyholder's loss of earnings as a successful actress during the period of her disablement. The appellant claimed under the policy to be indemnified by the respondents in respect of this liability. In arbitration proceedings the umpire made an award in favour of the appellant in the form of a special case, subject to the questions stated for the opinion of the court (1.) whether the appellant was entitled to avail himself of the arbitration provided for in the policy, and (2.) whether, on the assumption that he was so entitled, he was entitled to be indemnified by the respondents and to recover from them the sum of 5693*l.* 1*s.* 9*d.* Atkinson J. answered both questions in the affirmative (1), but the Court of Appeal (MacKinnon and Goddard L.JJ., Luxmoore L.J. dissenting) reversed his decision on the second point (2). The appellant appealed to the House of Lords.

Samuels K.C. and *Valentine Holmes* for the appellant. The appellant is entitled to be indemnified under the policy. The words of s. 2 (1.) are the widest that could be chosen—"any claim by any person," i.e., the whole world, the only limitation being that it must be a person to whom "the "policyholder shall become legally liable." Since a policyholder cannot be legally liable to himself the words "any "person" admittedly cannot there include him, but the words, when used in s. 2 (3.), are not subject to the same limitation as they are in s. 2 (1.). Their meaning must change according to circumstances. Under s. 2 (3.), therefore, whoever is driving as an authorized driver, gets the same indemnity as the policyholder save that a claim by the policyholder himself is not excluded. To be indemnified under s. 2 (3.) "in like "manner" as the policyholder under s. 2 (1.) the driver must be indemnified against "any claim by any person," just as the policyholder would be indemnified in respect of a claim brought against him by any other person. By s. 2 (3.) the respondents undertook a separate insurance against third-party risks in favour of the appellant, extending the protection of the policy to cover him in such events as happened. He became for that purpose the assured, which the policyholder, his employer, on being injured while a passenger in the motor-car driven by him and bringing a successful action to make him liable in damages, became the third party making the claim. Under this policy the respondents are the first party. The second party may be either—(*a*) the person who makes the contract of insurance in so far as he makes it for his own benefit, or (*b*) the person against whom the third party makes the claim and who under this policy is in fact insured against that claim. In the present case the second party, the appellant, falls under (*b*). If the meaning of the policy were not that contended for it could

(1) [1940] 1 K. B. 643.

(2) [1940] 2 K. B. 226.

not satisfy ss. 35 and 36 of the Road Traffic Act, 1930: see also s. 10 of the Road Traffic Act, 1934. [They referred to *Jones* v. *Birch Brothers, Ld.* (1) and *Tattersall* v. *Drysdale* (2).]

Sellers K.C. and *Berryman* for the respondents. The appellant is not entitled to be indemnified. The words in the margin of the policy must be read as part of s. 2, so that "any claim "by any person" in s. 2 (1.) must be read as "any claim by "any third party." The indemnity given to the authorized driver by s. 2 (3.) only operates "in like manner" to the indemnity to the policyholder under s. 2 (1.), and s. 2 (1.) does not give the policyholder any indemnity against a claim by herself. Therefore, s. 2 (3.) cannot do so. Moreover, the policyholder cannot be a third party vis-à-vis herself as assured, and so she cannot be a third party vis-à-vis the appellant. To hold otherwise would be to place an undue and uncontemplated burden on the respondents, enabling policyholders to recover by the indirect method of suing drivers employed by them for sums beyond those which they could claim directly from the respondents under the express terms of the policy in respect of certain categories of damage or injury. The owner of an insured motor-car is at all times a party to the contract of insurance. He is the second party. From time to time another person may be added as second party (e.g., his wife, his chauffeur, a child or a guest while driving it), but never to the exclusion of the owner who remains the second party throughout. This policy covered the appellant in respect of every liability to anyone injured by his negligent driving except the policyholder, who could not be simultaneously the second party and the third party. The third party cannot be a party to the contract of insurance. The policy stands for construction by itself and cannot be construed according to the terms of any Act of Parliament. It is, therefore, irrelevant whether or not it satisfies the requirements of the Road Traffic Acts, but, in fact, all the requirements of those Acts are fulfilled and the policyholder could never have been prosecuted for failing to observe them. The policyholder was under no statutory obligation to insure herself against injury, for the Acts are designed to protect the ordinary user of the highway who stands in no relationship to the owner or driver. Both under the policy and under the Acts "third-party" risks stand in contradistinction to those of the owner, user or driver of the motor-car. [They referred to *Royal London Mutual*

(1) [1933] 2 K. B. 597.

(2) [1935] 2 K. B. 174.

Insurance Society, Ld. v. *Barrett* (1) and *General Accident Fire and Life Assurance Corporation, Ld.* v. *Watson* (2).]

Samuels K.C. in reply. If it be true that a second party to a policy can never be a third party, a first party could never be a third party either, but it is clear that if the owner of a motor-car insured at Lloyd's ran over one of the underwriters and was successfully sued by him he could undoubtedly get indemnification from the underwriters under this policy.

The House took time for consideration.

Aug. 6. VISCOUNT SIMON L.C. My Lords, this appeal raises a short but difficult point of construction, as to which opinions have differed in the courts below, on a standard form of motor-insurance policy known as the " 'General' European Travel "Comprehensive Automobile Policy" issued by the respondents. If the appellant's claim is sustainable, it arises under s. 2 of the policy, which is described in the margin as dealing with "Third-party liability." This side-note cannot be disregarded. Whether it appears as a side-note or as a heading, it is part of the material to be considered in reaching a correct construction of the section. Moreover, a proposal form which was signed by the policyholder is, by the recital in the policy, expressly stated to be incorporated in it, and this proposal form refers to this section of the policy under the title " Third-"party indemnity. Public liability and property damage," and describes the nature of the indemnity as "unlimited "indemnity in respect of claims by the public (including "passengers, subject to exclusions) for personal injury," etc. Nevertheless, the main guide to the correct interpretation of the policy is the language of s. 2 itself.

The first and main sub-section is clear enough. It provides for what is ordinarily called, in this connexion, third-party insurance. In the Road Traffic Act, 1930, s. 35, which provides for compulsory insurance, the expression used is "third-party "risks." Whichever phrase is used, I think that the governing conception is that the insurer is one party to the contract and the policyholder another party, and that claims made by others in respect of the negligent use of the car may be naturally described as claims by third parties. If a passenger in a car is injured by negligent driving for which the policyholder is responsible, the passenger would have a claim to be

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(1) [1928] Ch. 411.

(2) (1938) Unrep.

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compensated by the policyholder, and an indemnity against this claim is provided by the sub-clause. It is to be noticed that the policy expressly excludes from the liability of the respondents "death of, or bodily injury to, any person where "such death or injury arises out of and in the course of the "employment of such person by the policyholder." Such claims would presumably be covered by workmen's compensation, and the policyholder's liability in regard to them would be separately insured against. Sect. 36 of the Act of 1935 contains a proviso exempting this sort of liability from compulsory insurance under the Act.

The difficulty in the case arises under sub-s. 3, which extends the insurance "to indemnifying in like manner any person "whilst driving" the car "on the order or with the permission "of the policyholder," subject to the provisos there stated. Such a person is, therefore, not the policyholder and, not being a contracting party, would not be able to compel payment from the respondents at common law. It has been held, however, and I am content to accept it in the present case, that a person who falls within the language of such a clause enjoys, by virtue of sub-s. 4 of s. 36 of the Act of 1930, a statutory right to sue the insurance company for an indemnity. If, for example, the appellant were sued for damages arising from his negligent driving as chauffeur by a member of the public who was injured or by a passenger in the car other than the policyholder, it is conceded that the indemnity would cover the case. The whole question, therefore, is whether, in applying sub-s. 3, a claim established against the appellant by his own employer, who is the policyholder, attracts the indemnity. MacKinnon and Goddard L.JJ. take the view that it does not. Luxmoore L.J. takes the view that it does. On the whole, I prefer the majority view of the Court of Appeal. The main provision of s. 2 is that contained in sub-s. 1. Sub-s. 3 is subsidiary. Under sub-s. 1 it is manifest that the policyholder could have no claim to indemnity. Does the range of persons whose claims may lead to indemnity under s. 2 (1.) of the policy change because of the extension in sub-s. 3? I think not. I do not see how a claim by the policyholder herself against her chauffeur can be regarded as a third-party risk under the policy. It was argued that the construction which I reject was to be preferred because otherwise the policy would not satisfy the requirements of s. 36 of the Road Traffic Act, 1930, but I do not think that this

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is so. Sect. 36, sub-s. 1 (*b*), ends with a proviso to the effect that the statutory policy is not "required to cover . . . ." liability in respect of ". . . . bodily injury to persons being "carried in . . . . the vehicle at the time of the occurrence "of the event out of which the claims arise." Miss Oberon was a "person being carried in the vehicle at the time "of the occurrence of the event," and there was, therefore, no obligation derived from the statute to secure indemnity for the appellant if he negligently injured her. The phrase "in like manner" in sub-s. 3 does not, in my opinion, extend or vary the list or class of persons whose claim may lead to an indemnity under the contract, but operates to introduce into sub-s. 3 the longer phrase "for loss of life or accidental bodily injury or damage to "property, etc.," which is not otherwise repeated from sub-s. 1 at all.

While the words which we have to construe are difficult, and while it is evident from the diverse opinions expressed about them that they are open to more than one interpretation, the construction which, in agreement with the majority of the Court of Appeal, I adopt is certainly the construction leading to the result which one would expect in a commercial document such as this. If the other view were right, then policyholders under this standard form of insurance, which has been in constant use for many years, have all the time had two strings to their bow if they were so unfortunate as to be involved in a motor collision where, as is usually the case, each driver puts the blame on the other. Their prudent course (though, as far as I know, they have never hitherto suspected it) would be to issue their writ against two parties, one the person responsible for the driving of the other motor, and the other against their own chauffeur. By one road or the other they would be sure (apart from inevitable accident) of making the insurance company pay. I do not believe that this was ever the intention of the framers of this contract at all. I am confirmed in my view by the fact that, in another part of the policy, the policyholder for certain kinds of personal damage may receive limited compensation from the respondents. If by a roundabout method of suing a negligent driver the policyholder may get, through him, from the respondents unlimited compensation for any and every sort of injury, it is hard to see why "accidents "to owner" (as this benefit is described in the proposal form) should be inserted. Another illustration of the difficulty which results from the construction which I reject would arise if the negligent driving of a chauffeur damaged the policyholder's car. If, after the policyholder has recovered damages from the chauffeur, the respondents have to find the money, this puts on them under s. 2 a liability to meet damage which is dealt with under s. 1 and which in that section is subject to limitations—see, for example, the exclusion of radio installations. Again, if the chauffeur's negligent driving damaged other property of the policyholder the insurance company could be made to pay, though the only property of the policyholder stated to be covered is that in s. 1.

The view I have been led to take is in accordance with the opinion of Lord Robertson, pronounced in Scotland on the petition in *General Accident Fire and Life Assurance Corporation, Ld.* v. *Watson* (1), and it is also supported by the view expressed by Tomlin J. (as he then was) in *Royal London Mutual Insurance Society, Ld.* v. *Barrett* (2). I do not, however, base my view primarily on earlier pronouncements, but on what I regard as the proper construction of the actual document before us.

VISCOUNT MAUGHAM. My Lords, the question which arises for decision in this appeal is whether, on the true construction of a policy of insurance issued on October 27, 1936, by the respondents to the policyholder (under the professional name of Miss Merle Oberon), the appellant, who by virtue of the Road Traffic Act, 1930, is admitted for the purpose of this appeal to be entitled to make a claim against the respondents under the policy, can recover from the respondents the amount of damages and costs for which the policyholder has recovered judgment against him. I find myself in agreement with the decision of MacKinnon and Goddard L.JJ., the majority in the Court of Appeal, but the case has led to a substantial difference of judicial opinion and is, doubtless, one of considerable difficulty. I shall endeavour to state, as clearly as I can, the reasons which have compelled me to the conclusion I have formed, but in doing so I shall follow the course which I believe is in accordance with the traditions of this House of not venturing to criticize the opinions of those of my colleagues who have arrived at a conclusion which differs from mine.

My Lords, in approaching the question whether the appellant is entitled to indemnity against the established claim of the

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policyholder, his own employer, against him, I am quite unable to shut my eyes to the fact that this appeal is not really for the benefit of the appellant, but must clearly be for the benefit of the policyholder herself. In the absence of agreement the policyholder could by well-known legal means enforce her judgment debt against sums, if any, payable to the appellant by the respondents. It is, moreover, necessary to remember that, on the assumption that the appellant is insured by the respondents against his liabilities to the policyholder, then, in the event of his becoming bankrupt or making a composition or arrangement with his creditors, his rights against the respondents will thereupon and without more be transferred to and vest in the policyholder under s. 1, sub-s. 1, of the Third Parties (Rights against Insurers) Act, 1930. Further, I see no reason to doubt that the obligation, if any, of the respondents could have been discharged by a payment direct to the policyholder: see *Israelson* v. *Dawson* (1). I think, therefore, that this appeal should be treated just as though the appellant were the policyholder herself.

The policy is one the scope of which is explained, to some extent at least, by the provisions of the Road Traffic Acts, 1930 and 1934, the object of which, as shown by the preamble to the Act of 1930, was "to make provision for the protection "of third parties against risks arising out of the use of motor "vehicles." One method of securing that end was by the sections requiring compulsory insurance against specific risks of injury to third parties: ss. 35 and 36. The Act of 1934 gave to third parties direct rights against insurers in respect of contracts to which they were strangers: see s. 10. It should be noted that under s. 36 of the Act of 1930 liability for the death of or bodily injury to passengers (with certain exceptions not material to the present case) are not within the ambit of compulsory insurance.

The policy in the present case is dated October 27, 1936, and follows a written proposal by the policyholder which she warranted to be true. It was stated to be the basis of the contract and to be considered as incorporated in the policy. The proposal began with "Third-party indemnity. Public "liability and property damage," words which are clearly printed in the margin. It promised: "Unlimited indemnity "in respect of claims by the public (including passengers . . . .) "for personal injury or damage to property against: (1.) the

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(1) [1933] 1 K. B. 301.

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"policyholder or his personal representative ; (2.) Any person "driving on the policyholder's order or with his permission, "or his personal representative if not entitled to indemnity "under any other policy." In my view, the word "public" here is sufficient prima facie to exclude the driver employed by the policyholder. The indemnity extended to hospital expenses and emergency treatment in accordance with the Road Traffic Acts. There followed indemnity for "Accidental "damage to insured automobile." There was no indemnity in respect of property belonging to the policyholder not being part of or an accessory to the automobile. There, indeed, was an express "exclusion" as regards such property. Nor was there any indemnity, properly so-called, to the policyholder for accidents to her, but she became entitled to certain "benefits" in the event of her death or certain specified injuries of a very serious nature, however caused.

The policy itself was a little more elaborate in some respects, and was divided into sections, introduced by the words "the "corporation will . . . . indemnify the policyholder in respect "of any automobile described in the schedule against . . . ." The first section related to damage to the car and its accessories resulting from a number of acts or accidents. It was for the benefit of the policyholder herself. The second section contained in the margin the words "Third-party liability," and was concerned with compulsory insurance for the protection of the public in the event of the driver of the car being unable to discharge his liabilities to members of the public. There are three sub-sections. The first and the third are material. These provisions as to claims by third parties relate (unlike claims under s. 1) to claims for loss of life and bodily injury and damage to property specified caused by, through, or in connexion with the automobile. Under s. 1 the contract is to indemnify the policyholder or his representative. Sect. 2 relates to legally established third-party claims.

Three questions arise under s. 2. First, who are the persons to be indemnified ? Secondly, by whom must the claims against the persons indemnified be made ? Thirdly, to what must the claims relate ? No difficulty seems to me to arise under sub-s. 1 of s. 2. The answer to question one is "the "policyholder or his representative." To question two it is "any person, including passengers, in the automobile." This will obviously not include claims by the policyholder. The

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answer to question three is "loss of life or accidental bodily "injury or damage to property (including animals) caused by, "through, or in connexion with the automobile, and also law "costs incurred with the consent of the respondents," obviously in resisting the claim. I will add to this that, in my view, a driver is clearly not a "passenger." The present dispute is as to the true meaning of sub-s. 3 of s. 2, which is expressed to be an extension of the indemnity given by the respondents under sub-s. 1. The extended obligation is to indemnify "in like manner" a new class of persons who may be driving the car not covered by sub-s. 1. The answers to the three questions must then be as follows: To question one, "any "person whilst driving any automobile described in the "schedule . . . . on the order or with the permission of the "policyholder," subject to certain provisos expressly mentioned which cause no difficulty in the present case. Clearly this will include the appellant, and he would therefore be entitled to indemnity against the claim of any member of the public, whether a pedestrian or travelling in a vehicle, who could establish a legal claim by reason of the appellant's negligence while driving the car. He is given this insurance for the benefit of the public, to meet the common event of his not being able to pay the damages awarded. There seems to me to be no reason for cutting down the meaning of "any "person" in the first sentence of this sub-section. The answer to question two must necessarily be found by referring back to sub-s. 1, for sub-s. 3 itself contains no statement, except by virtue of the words "in like manner," as to the class of persons whose legal claims *against* the person driving the car are to be covered by the indemnity. The answer, then, in my opinion, must prima facie be that the legal claims *against the driver* must be made by the persons referred to in sub-s. 1, that is, by members of the public. The third question must be answered again by a reference to sub-s. 1: "Any claim . . . . "for loss of life or accidental bodily injury or damage to "property (including animals) caused to property, by, through "or in connexion with such automobile."

It is on the proper answer to the second question arising as to sub-s. 3 that opinions have differed, i.e., the question as to the persons whose established hostile claims for the tortious acts of the permitted driver are to be included in the indemnity. Of course, the claims cannot be by him. Can they include claims by the policyholder, the owner of the car, against him?

My Lords, I find myself unable to give an answer in the affirmative, for a number of reasons which have a cumulative effect. The Road Traffic Acts do not require such claims to be covered by insurance. I cannot believe that the risk of the permitted driver being held liable for negligent driving for claims by the policyholder is "a third-party risk" within s. 35 of the Road Traffic Act, 1930, or within the terms as used in the policy. I do not see how such a claim by the policyholder against a permitted driver can be a claim by one of "the public." I cannot believe that a private car owner taking out such a policy as is here in question relating primarily to accidental damage to or loss of the car and to third-party risks, if asked whether he thought that he was being in effect insured against damage for personal injury done to him or to his property by the bad driving of his own chauffeur or by members of his own family or by friends permitted to drive the car, would reply in the affirmative. It seems to me he would say that in the event of his own death or serious bodily injury to himself caused by violent external and visible means and so forth as described in s. 3 of the policy he or his representatives would be entitled to the "compensations" mentioned in that section without proof of any negligence by any person, and that he did not contemplate bringing an action for damages against his chauffeur or (for example) his own son or daughter for negligence in driving the car which resulted in bodily injury to himself. Moreover, the results of holding that the adverse claims against which the respondents are giving insurance extend to the adverse claims of the policyholder against a permitted driver are very remarkable. It is clear that if the policyholder had been driving the car herself and had been personally injured in a collision she could not have made any claim against the respondents for any damages, apart from her claim to fixed compensation caused by violent accidental and visible causes under s. 3 of the policy. She is not insured against personal injury under s. 1. The contention here is that, if she is being driven by a chauffeur or any other permitted driver (being competent and licensed, etc.), and if she can establish a legal claim against that person, he becomes entitled to indemnity by the respondents against such claim, so that directly or indirectly the policyholder can recover from the respondents the damages she has sustained both for personal injury and for damage to her property (as mentioned in s. 2 (1.) of the policy), though she is not insured against these

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risks. No doubt, this may be the result of such a policy as we are considering if it is so provided on the true construction of the language used, but, in my opinion, it is a strange and unlikely result, and I think, unless the language clearly points to it, we should reject it. This point is admirably stated in the opinion of Lord Robertson in *General Accident Fire and Life Assurance Corporation, Ld.* v. *Watson* (1) on a petition to the Court of Session by the respondents relating to a very similar claim by the daughter of a policyholder under a policy which seems to me to raise precisely the same question as that raised in this appeal.

I have already expressed the opinion that prima facie the risk in question is not a third-party risk. I repeat that it would, nevertheless, be covered if the language of the policy was sufficiently clear to show that it was intended to cover it. With all respect to those who think otherwise, my view is that, for the reasons given above, the language as well as the general scheme of the policy points in the opposite direction. The policy must be construed, having regard to all relevant circumstances, including "the nature of the transaction and the "known course of business," as the parties intended it to be read: *Yorkshire Insurance Co., Ld.* v. *Campbell* (2). It must be construed in this case, whether in favour of or against a stranger to the policy who is entitled to statutory indemnity, in precisely the same way as if the policyholder, having made the appellant a bankrupt, were suing in her own name. If that is the true position, I am driven to the conclusion that the policy ought not to be construed as imposing on the respondents a liability to indemnify the policyholder extending far beyond that which the proposal and the policy seem to indicate. For these reasons, which follow those contained in the opinion of Lord Robertson and in the judgments of MacKinnon and Goddard L.JJ., I am in favour of dismissing the appeal.

LORD ATKIN (read by LORD WRIGHT). My Lords, the sole question for our determination is the right construction to be put on a policy of insurance, granted to Miss Merle Oberon by the respondents, styled "The 'General' European "Travel Comprehensive Automobile Policy" and dated October 27, 1936. It purports to indemnify the policyholder designated in the schedule, i.e., Miss Merle Oberon, in respect of an automobile described in the schedule as a 37 h.p. Buick

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(1) (1938) Unrep.

(2) [1917] A. C. 218, 225.

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against loss or liabilities mentioned in six sections which are described in the margin respectively as: (1.) Loss or damage. (2.) Third-party liability. (3.) Accidents to policyholder. (4.) Medical expenses. (5.) Towage. (6.) Free legal defence. The marginal descriptions no doubt form part of the contractual document, and are not to be ignored, as in a statute, but they must only be given their proper value, and, in my opinion, they are used as general descriptions of the particular provisions contained in the sections, the words of which alone define the terms of the actual contract between the parties. I can see no justification for transferring the words in the margin to the body of the document and treating the contract as though in s. 2 (1.) "any claim by any person" must be read as "any claim by any third party." It may mean the same thing but, if so, the meaning must be ascertained from the actual words used, and not an alteration of them. I myself feel no doubt that the only effect of the marginal words is to point out the well recognized distinction in insurance law between a claim for loss or damage suffered by the assured, and a claim for liability incurred to another person for loss or damage inflicted on him by the assured, "third-party liability" in respect of "third-party risks." The extent of the insurance provided will depend on the words of the written indemnity.

On examining the provisions of s. 2 it will be found that the first sub-section deals with the policyholder. Starting from the body of the policy, "will indemnify the policyholder "in respect of the [scheduled] automobile against . . . . "s. 2 (1.) all sums which the policyholder shall become legally "liable to pay in respect of any claim by any person (including "passengers in the automobile), for loss of life or accidental "bodily injury or damage to property . . . . caused by "through, or in connexion with such automobile." "Any "person" should surely receive its ordinary meaning of any member of the public. The policyholder himself cannot come within the term, not because he is not a person, but because the clause only relates to a claim by any person which the policyholder is legally liable to pay, and such a liability cannot exist on a supposed claim at the same time by and against himself. It would appear also that for similar reasons a claim by any person would not include a claim by the wife or husband of the policyholder. Put in another way, the words "any "person" do not bear a restricted meaning, but the policy-

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holder is excluded from the scope of the indemnity by the very description of the liability insured. Apart from this it includes any member of the family, child, parent, relative, fiancé, liabilities towards whom have often been established, and would appear to include a chauffeur when not driving were it not for the express exclusion of claims under the Workmen's Compensation Act in proviso (*a*). I feel bound, therefore, to reject the argument that the words "third party" alone necessarily exclude the policyholder from the scope of the indemnity given.

It is necessary, however, to consider the second argument for the respondents which, as I understand it, is that the indemnity given in s. 2 (3.) to the person driving "on the "order or with the permission of the policyholder," whom I will call the authorized driver, is in terms a promise to indemnify "in like manner." This refers back to s. 2 (1.), the indemnity to the policyholder, and, as that clause does not indemnify the policyholder against a claim by the policyholder, so, it is said, the authorized driver receives no indemnity against a claim by the policyholder. Sub-s. 3 begins anew with a fresh promise of indemnity. "The insurance under this "section shall also extend to indemnify in like manner any "person whilst driving, etc." The subject of indemnity is to be ascertained by reference. To me it seems clear that on making the necessary reference the words should read "extend "to indemnify" [an authorized driver] "against all sums which "he shall become liable to pay in respect of any claim by any "person," etc. "Any person" must receive its ordinary meaning, and on this occasion the policyholder is plainly "any person." The authorized driver is excluded because, as before, he can be under no liability to himself. I do not agree with the opinion of Lord Robertson in *General Accident Fire and Life Assurance Corporation, Ld.* v. *Watson* (1), the case cited and relied on by the majority of the Court of Appeal, to the effect that, as paraphrased by the Lord Chancellor in argument, sub-s. 1 provided an exhaustive list of persons who can claim, and that list is transferred to sub-s. 3. I think, therefore, that the appellant was entitled to be indemnified against the claim of the policyholder, and that the order of Atkinson J., who agreed with the learned umpire, then Mr. Maxwell Fyfe K.C., should be restored.

Personally, I am fortified in this opinion by consideration of the Road Traffic Act, 1930. It is under the provisions of that Act that the appellant himself can sue the insurers, and I agree with MacKinnon L.J. (1) that this part of the policy "is obviously based on the requirements of s. 35 of the Act "of 1930" and, I would add, s. 36. The penal provisions of s. 35 prohibit any person using a motor vehicle on the road "unless there is in force in relation to the user of the vehicle "by that person such a policy of insurance in respect of third "party risks as complies with the requirements of this part "of this Act." The requirements are expressed in s. 36. The policy must be one which insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death or bodily injury to any person caused by or arising out of the use of the vehicle on a road. It will be noticed that there is no reference to policyholder or assured but merely to "such person, persons or classes of persons as "may be specified in the policy," and by sub-s. 4 a person issuing a policy of insurance under this section shall be liable to indemnify the persons or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of those persons or classes of persons. I have no doubt that the insurers intended to issue and the policyholder to receive a policy which in respect of third-party risks complied with the requirements of the Act, and that they intended, therefore, that in terms of s. 36 the persons specified should be insured in respect of any liability in respect of the death or bodily injury "to any person." Otherwise, the user of the vehicle would not be protected by the policy from the penal provisions of s. 35.

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(1) (1938) Unrep.

I cannot help thinking that the judgments of those who think otherwise are unconsciously affected by the unusual and perhaps unexpected spectacle of master suing chauffeur and recovering heavy damages against him, no doubt with a view of eventual recovery from the insurance company, but this kind of insurance is not limited to the rich owners of 37 h.p. Buicks. It is given to the poor owner of a small runabout who may lend his car for a week-end or for days to an equally impoverished friend. If during that period the borrower were to run down and injure the owner it would be in no way strange that the driver should be indemnified from his liability and the injured owner should receive the benefit of the indemnity.

(1) [1940] 2 K. B. 226, 232.

Such a situation as it appears to me is demanded by the Act. I am of opinion that the appeal should be allowed, and the judgment of Atkinson J. restored. The respondents must pay the costs here and in the Court of Appeal.

LORD WRIGHT. My Lords, insurance against third-party liability is one of the commonest kinds of insurance, especially necessary under modern conditions. It involves three parties, the insurer, the assured and the third party who is making the claim. The assured is not entitled under s. 2 (1.) of the policy to an indemnity against direct loss or damage suffered by himself, but only against liability to pay compensation to a third party who is claiming against the assured. This clause of the policy does not help the appellant, because under it the only person insured is the policyholder. What he relies on is s. 2 (3.) which, on the face of it, expressly extends the scope of the insurance so as to cover, under the conditions therein specified, in addition to the policyholder, any other person, subject to the proviso that the person driving is a competent driver and is licensed and is not disqualified and has not been convicted of certain offences in connexion with the driving of cars. It is not suggested that the appellant's claim is excluded by any of these matters. His contention is that by s. 2 (3.) the respondents undertake in his favour a separate insurance against third-party liability in such events as have happened, so that he thus becomes in that connexion the assured while the policyholder becomes pro hac vice the third party who is claiming in this case to hold him liable in the amount of the judgment which she has obtained against him for bodily injury caused to her by him by or through the specified automobile, "in like manner" as the policyholder would be entitled to be indemnified in respect of a claim brought against her by another person for similar injuries. This involves an extension of the policy protection beyond the policyholder. The extension is, "in like manner," to cover another assured, namely, in this connexion the appellant who was at the material time a person driving the car "on "the order or with the permission" of the policyholder.

When the language is closely scrutinized, I am unable to give it any other meaning. The person driving is, in truth, substituted pro hac vice as assured for the policyholder. It was argued that the words "in like manner," found first in s. 2 (1.), when carried over into s. 2 (3.) were to be construed as excluding the policyholder on the ground that the policyholder could not under s. 2 (1.) be a third party vis-à-vis herself as assured, and, therefore, could not be a third party vis-à-vis the appellant within the meaning of s. 2 (3.) of the policy, but that would involve reading the words "claim by "any person," etc., when extended to and read as applying to a claim under s. 2 (3.) as meaning "by any person other "than the policyholder." That would be to introduce a special limitation on the words when brought over into s. 2 (3.) which, to my mind, is inconsistent with the words "in like "manner." There is no warrant for this in the actual language of the clauses. "Any person" in s. 2 (1.) is any person claiming, that is to say, any third party. The policyholder cannot claim against herself as a third party. In the same way the new and added assured under s. 2 (3.) cannot claim against himself. This is a limitation under s. 2 (3.) which is "in like manner" and marches with the limitation in s. 2 (1.). The identity of the assured may change under the operation of s. 2 (3.) and in like manner the identity of the third party, in facts like those in question, may change. The policyholder thus may become under s. 2 (3.) the third party to whom the new assured, the chauffeur, has become liable. The policy, in its primary import, is no doubt, a single insurance for the benefit of a single assured, but s. 2 (3.) involves that it may during its currency cover a new assured, in place for the time of the original assured, if the circumstances postulated by s. 2 (3.) come into effect. The new assured, it is to be noted, is by the terms of s. 2 (3.) to "observe fulfil and be subject to "the terms exceptions and conditions of the policy so far as "they apply." Thus he is bound by condition 8, the arbitration clause, as the Court of Appeal, agreeing with the court below, held. In other words, throughout the conditions "policyholder" has to be read, so far as they can apply beyond the policyholder, as meaning "policyholder or any other "person who is assured by virtue of s. 2 (3.)." Thus, for instance, condition 1 (notices), and condition 2 (claims and legal proceedings and their conduct) would apply to such a person. Condition 6 (contribution if there is another insurance) would, it seems, not so apply because s. 2 (3.) is subject to the proviso that there is to be no other insurance subsisting under which such other person may be indemnified. Conditions 3 and 5 are also conditions which would not apply to any assured other than the policyholder.

This short point of construction, to my mind, concludes the matter. I find nothing in the rest of the policy inconsistent with that meaning. On the contrary, that meaning seems to be in accordance with the general purpose of s. 2 (3.). The policy must be construed according to its terms, but there can be no doubt that the object of s. 2 (3.) was to comply with s. 35 of the Road Traffic Act, which makes it a criminal offence for any person to use or to cause or permit any other person to use a motor vehicle on the road unless there is in force in relation to the user by that person or that other person a policy or security against third-party risks complying with the requirements of the Act, as set out in s. 36, including, among other things, an insurance against third-party risks. The policy might on its true construction fail to comply with the statute, but prima facie at least it may be assumed that it is intended to comply with the law. It may go beyond what the law requires. Thus, the policy in question includes passengers, a provision which is not necessary under s. 36, sub-s. 1, of the Road Traffic Act. Under this contract the policyholder is a passenger and the appellant is a person driving on her order. At first sight it might seem unusual that an employer should obtain judgment against her chauffeur, but an employee is generally as much liable to his employer if he causes his employer damage by negligence as is anyone else who does so. Presumably, the chauffeur has not means to satisfy the judgment against him at the suit of the policyholder, but the judgment is certainly a burden of which he would desire to be relieved by third-party insurance. Nor is the policy to be construed as if the only possible case was that of a rich employer and a chauffeur not largely endowed with the world's goods. The person driving might be a wealthy friend and the policyholder for whom he was driving might be of moderate means, or the person driving might be, and would generally, perhaps, be, a friend or member of the household. In any case, any person driving another's car at that other's request would desire and expect to be covered by insurance. It was to meet this desire and expectation that the extended insurance was introduced and was made available to such drivers by sub-s. 4 of s. 36 of the Act, which imposes on the insurer the extended liability in favour of other parties if the policy purports to cover them, as this policy does. No doubt, also, the legislature intended to secure that any person driving a car should be provided by insurance with the means

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of compensating anyone who is injured by his negligence. I cannot find in the provisions of the policy anything to qualify these conclusions which I have stated. In effect the policyholder became pro hac vice the third party under the policy. The resulting position is, I think, in no way different from what it would have been if the appellant had been insured against third-party risks by a separate policy issued to himself.

Lord Robertson's judgment in *General Accident Fire and Life Assurance Corporation, Ld.* v. *Watson* (1), which I have considered in the copy supplied to your Lordships, depends, I think, on his view that there is only one contract, and hence that the policyholder cannot be divested of her character of assured or become a third party. I read, however, as I have explained, s. 2 (3.) as creating a new contract in the particular contingency, supplemented as it is by s. 36, sub-s. 4, of the Act, which is for the purpose of avoiding the difficulties of constituting someone a person insured under the policy other than the policyholder or the person who actually makes the contract. These difficulties were illustrated in *Williams* v. *Baltic Insurance Association of London, Ld.* (2), and in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (3). The sub-section in its introductory words also removes a difficulty under the Life Assurance Act, 1774, as Scrutton L.J. explained in *McCormick* v. *National Motor and Accident Insurance Union, Ld.* (4). I ought to add that I am not impressed by the argument that it becomes clear that an undue or uncontemplated burden is placed on the respondents by the construction which I have accepted when the benefits to the policyholder claimable in respect of death or certain types of bodily injury by her are taken into account. These stipulations have no bearing in law on a claim by her as a third party under s. 2 (3.) for indemnity against the person driving. It is not, perhaps, material, but it is not suggested that she either did or could have claimed any of these benefits. I agree that the appeal should be allowed.

LORD PORTER (read by Lord Wright). My Lords, this case has given rise to much divergence of opinion among the legal minds which have been applied to its solution. A legal arbitrator, a judge and one lord justice have been for admitting the claim and two lords justices against. It is obviously

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(1) (1938) Unrep.
(2) [1924] 2 K. B. 282.
(3) [1933] A. C. 70.
(4) (1934) 40 Com. Cas. 76, 84.

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a matter of some difficulty and the more plainly so as I understand your Lordships are yourselves not unanimous in the result at which you would arrive.

The point itself is a short one and mainly depends on the construction of two sub-sections in an insurance policy. For many years it has been the practice of insurance companies in issuing a policy of motor insurance to cover the assured against two main types of loss (*a*) loss or damage to the property of the assured, e.g., the motor-car itself, and (*b*) the risk of liability to third parties, i.e., legal liability to some person other than the assured for damage caused by the car. Later, it became not uncommon for the insurers to cover not only the assured, but also anyone driving with the assured's consent against the latter type of liability. Originally different views prevailed in different tribunals as to the right of the authorized driver to recover under such a policy. Roche J. in *Williams* v. *Baltic Insurance Association of London, Ld.* (1) held that such a driver was entitled to take advantage of the protection given by it, whereas the Privy Council in *Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (2), held that in general he was not because he was not a party to the contract. This difficulty has now been resolved by the Road Traffic Act, 1930, s. 36, sub-s. 2 (*b*), an Act which not only makes it a criminal offence for anyone to drive a car on the road unless covered against third-party liability by a policy of insurance, but also, by the section referred to, enables an authorized driver to rely on the protection afforded by the terms of the policy when extended to cover him, though he did not personally take any part in effecting the contract of insurance. No question of this kind, however, arises in the present case since the respondents expressly admitted the appellant's right to sue, but not his right to recover.

The appellant's contention can be simply stated. The policy, he said, in addition to insuring the policyholder against loss or damage to the insured car, promised also to indemnify the policyholder under s. 2 (1.) against "all sums which the "policyholder shall become legally liable to pay in respect of "any claim by any person (including passengers in the auto- "mobile) for . . . . accidental bodily injury . . . . caused in "connexion with such automobile and in addition the law "costs," and by s. 2 (3.) "the insurance under this section

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(1) [1924] 2 K. B. 282.

(2) [1933] A. C. 70.

"shall also extend to indemnify in like manner any person "whilst driving any automobile described in the schedule "hereto on the order or with the permission of the policy-"holder." I was, said the appellant, a person driving such automobile "on the order . . . . of the policyholder." It is true that sub-s. 3 does not specify the risks against which I was insured except by saying I was insured "in like manner." That can only mean in like manner as the policyholder is insured, and one can, therefore, read sub-s. 3 in reference to me as if it read: "the company shall indemnify the "authorized driver in respect of all sums which he shall "become liable to pay in respect of any claim by any person "(including passengers) for accidental bodily injury." My employer was a passenger, she was injured, she brought a successful claim against me, and now I call on the respondents to indemnify me in the terms of their policy. The proposition may be stated more generally by saying that in a case where someone is permitted to drive by the policyholder the words "person driving on the order or with the permission of the "policyholder" must be substituted in sub-s. 1 for the word "policyholder." One may also illustrate, and, I think, support, the contention by referring to the further provision contained in sub-s. 3 that the authorized driver "shall fulfil "and be subject to . . . . the conditions of the policy so far "as they apply." Except in conditions 6 and 10 no reference is made to anyone other than the policyholder, yet there are matters contained in others of the conditions, as in 1, 2, 8 and 9, which must, I think, be binding on an authorized driver. To take only one example, if it were not so, there would be no provision whereby the company could take over the defence of an action brought against an authorized driver even if the claim were made by some person in no way connected with the policyholder, the driver, or the car.

The respondents reply, in the first place, that the risks against which the authorized driver is protected are not specified in s. 2 (3.) of the policy, that he is to be indemnified only "in like manner " to the policyholder, that to ascertain those risks recourse must be had to sub-s. 1 under which the policyholder is, it is true, protected against a claim made on her by any person, but that, as she cannot claim against herself, a claim "by any person " cannot include a claim by the policyholder, and that, consequently, the authorized driver is not protected against such a claim.

I do not think the conclusion follows from the premises. The authorized driver is to be indemnified "in like manner" to the policyholder, not merely against such claims as could be made on her. In my view, the true reading of sub-s. 3 is that, just as the policyholder is to be indemnified against any claim made on her by a person other than herself, so the authorized driver is to be indemnified against any claim made on him by a person other than himself.

In the second place, it is contended that, as appears from the statement in the margin of s. 2, the insurance is only against third-party liability; that the policyholder is a party to the contract, and, therefore, cannot be included in the term "third-party"; that, having regard to the marginal reference and general scope of the policy, the words "any claim "by any person" must be confined to any third person, and that the wording of sub-s. 3 shows the policyholder and the authorized driver as alike parties to the policy—second parties, if you please, the insurance company being the first— but not third parties. The argument, I think, fails. I doubt if the phrase "Third-party liability," when used in the policy, has any such definite meaning as that ascribed to it by the respondents. In my view, in a policy such as this indemnity against third-party liability is used in contradistinction to indemnity against "Loss or damage" to the car and means only that the insurer will indemnify the assured against any proper claim made on him by a person who is injured by the negligent driving of the car. I do not think that there is any question of first, second and third parties. The phrase is merely a useful description of a particular type of insurance. Consequently, the policyholder would be entitled to indemnity even if she were responsible for an accident to (say) a Lloyd's underwriter who insured her, and the authorized driver would be protected against a claim in respect of such an accident and against a claim such as is made in this case by the policyholder herself. But let me assume that "third party" is used precisely and necessitates the existence of three parties, the third of whom must make a claim before the assured can demand to be indemnified. Let me also assume that the words "any claim by any person" mean "any claim by any third "person." Still, in my opinion, the ingredients necessary for success exist in the present case. The term "third party" must, I think, take its meaning from the words in collocation with which it is used. No doubt, any claim by any third party when used in a case where the policyholder is herself liable would exclude any recovery by her both because she cannot sue herself and because she is not a third party in a claim which she herself makes. But, in my opinion, she is a third party in reference to her authorized driver. For the purposes of a claim made by her against him, he is the assured, the company are the insurers and she is the third party.

The majority of the Court of Appeal seem to have felt that to allow the appellant to recover would in some way recompense the employer twice over. It is, of course, true that she might in an appropriate case get the compensations provided by s. 3 of the policy and also damages in respect of the same injury, but this result is not unusual. The insurance provided by s. 3 is accident insurance and could not normally diminish the damages which she would get against a negligent driver. If the driver of another car were responsible for the accident she would get both, and so she would if the authorized driver of her own car had enough money to pay. In truth, her position is not material and does not come in question. The authorized driver, not the policyholder, is the claimant on the policy, and the fact, if it be a fact, that in a particular case he cannot pay unless he is indemnified is immaterial to the matter in issue. The question is not whether as a result of this action she will receive compensation or even more than compensation for her injuries. It is whether the appellant is entitled to be indemnified against a claim legally enforceable against him. In a policy such as this there is not, as I conceive it, one contract of insurance only. There is one with the policyholder and one also with each person driving on his order or with his permission. All these contracts are contained in one document, namely, the insurance policy, but nevertheless they do not cover the same persons or in the case of authorized drivers insure against the whole of the risks against which the policyholder is protected. This view is at variance with that expressed by Lord Robertson in the case of *General Accident Fire and Life Assurance Corporation, Ld. v. Watson* (1), of which a transcript was printed in the record provided for your Lordships. In substance, I think the learned judge reached a conclusion antagonistic to the claim made on behalf of an authorized driver because he thought that there was only one contract, though there were two separate indemnities, and that, as the policyholder was a party to that contract,

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she could not be properly described as a third party against whose claim the driver was to be indemnified. For the reasons I have given I find myself unable to accept his reasoning. It is true there is some slight difference in wording between the policy in that case and in this, but I cannot myself make any distinction on that ground. I agree with the majority of your Lordships in thinking that the appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Walter, Burgis & Co.*
Solicitors for respondents: *Kenneth Brown, Baker, Baker.*

[HOUSE OF LORDS.]

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July, 13, 14, 16, 17, 21; *Aug.* 6.

AMAND . . . . APPELLANT;

AND

HOME SECRETARY AND MINISTER OF DEFENCE OF ROYAL NETHERLANDS GOVERNMENT . . . . RESPONDENTS.

Appeal—" Criminal cause or matter "—Absentee from military service—Allied army in England—Arrest—Application for habeas corpus—Refusal—Appeal to Court of Appeal—Jurisdiction to hear appeal—Army Act, s. 154, *paras.* 1, 3, 4*—Supreme Court of Judicature (Consolidation) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*a*).

By the Supreme Court of Judicature (Consolidation) Act, 1925, s. 31, sub-s. 1: " No appeal shall lie—(*a*) except as provided by " the Criminal Appeal Act, 1907, or this Act from any judgment " of the High Court in any criminal cause or matter."

A Netherlands subject, who had resided in England for fourteen years, was arrested as an absentee without leave from the Netherlands army in Great Britain, in which he was an ordinary conscript, and taken before a magistrate with a view to his being handed over to the Netherlands military authorities. The Divisional Court refused his application for a writ of habeas corpus.

**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD WRIGHT and LORD PORTER.

The Court of Appeal held that it had no jurisdiction to hear an appeal from this decision. On appeal to the House of Lords :—

Held, that the case came within s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925, as the judgment appealed from was in "a criminal cause or matter," and that, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

The distinction between cases in which it is possible to appeal from a refusal to grant a writ of habeas corpus, and cases in which no appeal is possible, turns on the nature and character of the proceeding in which habeas corpus is sought. If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal, and there can be no appeal from a refusal to grant the writ.

Decision of the Court of Appeal (sub nom. *Rex* v. *Home Secretary. Ex parte Amand*) [1942] 2 K. B. 26, affirmed.

APPEAL from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows : The appellant, Jean Jacques Amand, was a Netherlands subject and had lived in England for the last fourteen years. By a royal decree dated August 8, 1940, the Queen of the Netherlands purported to impose on all Netherlanders, born between certain dates and resident in Great Britain, an obligation to register for military service with the Netherlands forces. Article 3 of the decree defined "ordinary conscripts," and art. 6 provided that, on being called up for military service, an "ordinary conscript" should be deemed to have been enlisted with the Netherlands navy or army. This definition of an "ordinary conscript" applied to the appellant. On or about August 9, 1940, and again on or about August 16, 1940, the appellant received calling-up notices under this decree ordering him to report to a Netherlands armed camp as a conscript. The appellant complied with the notice under protest and served with the Netherlands army in England until January 30, 1941, when he was given one week's leave. He did not return to service on the expiration of his leave, and on February 17, or thereabouts, British police officers called on him and requested him to return to camp. He did not do so, and on March 4 a detective sergeant of the metropolitan police informed the appellant at Bow Street police station that if he did not return he would be arrested and that he would then be handed over to the Netherlands military police. The appellant, taking the view that he was not amenable to the military law of the Netherlands, still did not return to

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camp. On January 7, 1941, the officer commanding the Dutch military forces in the United Kingdom had made a general request under the provisions of s. 3, sub-s. 3, of the schedule to the Allied Forces (Application of 23 Geo. 5, c. 6) (No. 1) Order, 1940 (St. R. & O. 1940, No. 1818), made under the Allied Forces Act, 1940, that any person who was alleged to be a deserter or absentee without leave from those forces should be apprehended and dealt with under the section, and on March 13, 1941, a document addressed to the Commissioner of Metropolitan Police and signed by the proper Dutch authority certified that the appellant was "a deserter "or absentee without leave" and specifically requested that he be arrested forthwith and handed over to military escort for return to his unit. On March 14, 1941, he was arrested and detained at Bow Street police station. Next day he was brought before the chief metropolitan magistrate who released him on bail on being informed that an application had been made on the previous day for a writ of habeas corpus. This application was dealt with by a Divisional Court on May 23, when the writ was refused: *In re Amand* (1). The appellant attempted to appeal to the Court of Appeal from this decision, but he later abandoned this, surrendered to his bail, and made a new application for a writ of habeas corpus to Uthwatt J. as vacation judge on August 27, 1941. The learned judge directed that notice of the application should be served upon the Home Secretary and the Dutch Minister of Defence, and the appellant was again released on bail. In January, a Divisional Court, consisting of Wrottesley, Croom-Johnson, and Cassels JJ., dealt with this application. The fact that that appellant had been released on bail was, by agreement, disregarded and the case was argued on the assumption that he was still in the custody of the police. The argument before the Divisional Court turned on the question whether or not the appellant was a member of the Netherlands forces and, as such, came within the purview of the provisions of the Allied Forces Act, 1940, and the Order in Council made thereunder. The Divisional Court reserved its decision and on January 30, 1942, delivered judgment unanimously dismissing the appellant's application (2). From this judgment the appellant sought to appeal to the Court of Appeal and that court (consisting of Lord Greene M.R., MacKinnon and Goddard L.JJ.) unanimously held that a preliminary objection that no appeal

(1) [1941] 2 K. B. 239.

(2) [1942] 1 K. B. 445.

lay was well founded (1). The appellant appealed to the House of Lords.

G. O. Slade and *V. Wolff* for the appellant. This was not a " criminal cause or matter " within s. 31, sub-s. 1 (*a*), of the Supreme Court of Judicature (Consolidation) Act, 1925. To be so a proceeding must (*a*) involve a charge of crime, i.e., an offence against public law, and (*b*) it must be preferred or be about to be preferred before a court or judicial tribunal having or claiming jurisdiction to impose punishment for an offence or an alleged offence : *In re Clifford and O'Sullivan* (2). The onus lies on those who seek to establish that this is a " criminal cause or matter " to show that the necessary elements are present. As to the first condition, there are three possible views : (*a*) The offence must be against the public law of England. (This would involve overruling *Ex parte Woodhall* (3) and *Rex* v. *Brixton Prison* (*Governor of*). *Ex parte Savarkar* (4.)) (*b*) The offence must be one which, if committed in England, would be an offence against the public law of England. (This would involve overruling only the latter case.) (*c*) The offence must be against the public law of the country before whose courts the charge is to be preferred. On any of these views this is not a " criminal "cause or matter." No crime has been committed. Desertion or absence without leave is a purely military offence and is not a criminal act within the Summary Jurisdiction Acts. The Allied Forces Act, 1940, did not make desertion from the Netherlands army a crime, nor is there any evidence that absence from the army without leave is a crime in the Netherlands, especially under a bona fide claim of right. As to the second requirement laid down in *In re Clifford and O'Sullivan* (2) the question whether a particular proceeding is a " criminal cause or matter " is one of procedure. It is not enough that the act which originates the proceedings should be a crime, nor that the proceedings may result in a separate and independent proceeding which is criminal. The proceeding itself in which or in relation to which the order attacked is made must be criminal. The true character of any proceeding can be affixed to it by an examination of the results to which it may lead. In a " criminal cause or matter " the court or judicial tribunal must have a clear jurisdiction to impose punishment. In the present case the magistrate decided

(1) [1942] 2 K. B. 26.
(2) [1921] 2 A. C. 570, 580.
(3) (1888) 20 Q. B. D. 832.
(4) [1910] 2 K. B. 1056.

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nothing relevant to a criminal charge and he never claimed any jurisdiction to punish. The appellant was not charged with being a deserter or absentee without leave in the sense that the magistrate might find him guilty or not guilty or commit him for trial. He could only hand him over to a military escort for return to his unit. In a criminal case the only contemplated result of committal for trial is that the defendant shall be tried: see Stone's Justices' Manual, 74th ed., p. 43, and Indictable Offences Act, 1848, sch.; and in the present case the Netherlands authorities might deal with the appellant by other methods. It is not a necessary sequel to his being handed over to an escort that he be tried by court martial for some offence. In this respect there is no difference between an English soldier and a Netherlands soldier. Further, the appellant is not subject to military law at all, and a complete usurpation of jurisdiction cannot be turned into a "criminal "cause or matter" merely because it bears the outward semblance of a criminal charge. [He referred to *Rex* v. *Manchester Local Profiteering Committee* (1); *Provincial Cinematograph Theatres, Ld.* v. *Newcastle-upon-Tyne Profiteering Committee* (2); *Rex* v. *Garrett* (3); *Director of Public Prosecutions* v. *Lamb* (4); *Derby Corporation* v. *Derbyshire County Council* (5); *Seaman* v. *Burley* (6); *Ex parte Pulbrook* (7); *Reg.* v. *Barnardo* (8); *Reg.* v. *Barnardo. Jones's Case* (9); *Barnardo* v. *Ford* (10); *Attorney-General* v. *Bradlaugh* (11).]

Sir Donald Somervell A.-G. and *Hubert Parker*, for the first respondent, were not called on to argue.

Le Quesne K.C. and *McClure*, for the second respondent, were not called on to argue.

The House announced its decision that the appeal should be dismissed and intimated that the opinions would be delivered at a later sitting.

1942. Aug. 6. VISCOUNT SIMON L.C. My Lords, the House has already announced and put into effect its unanimous decision that this appeal should be dismissed, for there were

(1) (1920) 89 L. J. (K. B.) 1089.
(2) (1921) 90 L. J. (K. B.) 1064.
(3) [1917] 2 K. B. 99.
(4) [1941] 2 K. B. 89.
(5) [1897] A. C. 550.
(6) [1896] 2 Q. B. 344.
(7) [1892] 1 Q. B. 86.
(8) (1889) 23 Q. B. D. 305, 309.
(9) [1891] 1 Q. B. 194.
(10) [1892] A. C. 326.
(11) (1885) 14 Q. B. D. 667.

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good public reasons why this conclusion should be promptly known. The appeal has been put in the list for to-day in order that the reasons for that conclusion should be stated. The following is my opinion, in which my noble and learned friend Lord Atkin desires me to say that he concurs.

Notwithstanding the able argument addressed to us by the two counsel for the appellant, I entertain no doubt that this appeal should be dismissed. The whole question is whether the appeal from the Divisional Court to the Court of Appeal was an appeal from a "judgment of the High Court "in any criminal cause or matter" within the meaning of s. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925. By s. 225 of that Act "matter" includes every proceeding in court not in a cause. The Court of Appeal thought that the decision of the Divisional Court was in a "criminal cause or matter," and, consequently, held that the appeal was incompetent. I agree with that view, and, as your Lordships are of the same opinion, it follows that the appeal to this House must fail. The House has only to decide the question whether the judgment of the Divisional Court, refusing a writ of habeas corpus, was a judgment in a "criminal cause or matter." If we were to take the view that it was not, then, and then only, would it become necessary for either the Court of Appeal or this House to consider the correctness of the decision of the Divisional Court that the appellant was a member of the Netherlands forces. If no appeal lies, that question cannot be canvassed on this appeal.

My Lords, s. 1, sub-s. 3, of the Allied Forces Act, 1940, empowers His Majesty to provide by Orders in Council for the application of certain sections of the Visiting Forces (British Commonwealth) Act, 1933, with or without adaptations and modifications, to the military forces of any Power allied with His Majesty who are for the time being present in the United Kingdom. The Dutch forces now in this country come within this description. In the exercise of this power, His Majesty by Order in Council dated October 11, 1940 (St. R. & O., 1940, No. 1818), ordered that such of the provisions of the 1933 statute as are contained in the schedule to the Order in Council should have effect, as therein set out with adaptations and modifications in relation to the naval, military and air forces of (among other allied Powers) the Netherlands. The relevant provision of the statute of 1933 as applied with adaptations and modifications is set out in s. 3 of the schedule which runs as follows: "(1.) This section applies to the naval, military and air forces "of allied Powers, whether or not they are allied forces as "defined in para. 2 of this order. (2.) Subject to the provisions of this section, paras. 1 to 4 and para. 9 of s. 154 "of the Army Act (which relates to the apprehension of "deserters and absentees without leave from a home military "force) shall within the United Kingdom apply in relation "to a deserter, or absentee without leave, from any force "to which this section applies, as they apply in relation to "a deserter, or absentee without leave, from a home military "force, but as if any reference in the said paragraphs to "military custody included a reference to naval or air force "custody; Provided that the said para. 9 shall not apply "by virtue of this subsection except in relation to a deserter "or absentee without leave from an allied force. (3.) No "person who is alleged to be a deserter from any such force "as aforesaid shall be apprehended or dealt with under this "section except in compliance with a specific request from the "Government of the allied Power to which the force belongs, "and a person so dealt with shall be handed over to the "authorities of that Power at such place in the United "Kingdom as may be agreed: Provided that a person who is "alleged to be a deserter or absentee without leave from an "allied force may also be apprehended and dealt with under "this section in compliance with a request, whether specific "or general, from the officer commanding that force. (4.) For "the purposes of any proceedings under this section—(i.) a "document purporting to be a certificate under the hand of the "Secretary of the Admiralty, the Secretary of the Army "Council or the Secretary of the Air Council, that a request "has been made under sub-s. 3 of this section shall be "admissible without proof as evidence of the making of such "a request; (ii.) a document purporting to be a certificate "under the hand of the officer commanding a unit or detachment of any force to which this section applies that a named "and described person was at the date of the certificate a "deserter, or absentee without leave, from that force shall "be admissible without proof as evidence of the facts so "certified." An "allied force" is defined in para. 2 (1.) of the order to mean "any body, contingent or detachment "of the naval, military, or air forces of an allied Power which "is, with the consent of His Majesty's government in the

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"United Kingdom, lawfully present in the United Kingdom "or on board any of His Majesty's ships or aircraft." The unit in which the appellant had been serving was an "allied "force" within this definition. The officer commanding the Dutch military forces in the United Kingdom had on January 7, 1941, made a general request (see the proviso to sub-s. 3 of s. 3 of the schedule to the order) that any person who was alleged to be a deserter or absentee without leave should be apprehended and dealt with under the section, and on March 13, 1941, a document addressed to the commissioner of metropolitan police and signed by the proper Dutch authority certified that the appellant was a deserter or absentee without leave and specifically requested that he be arrested forthwith and handed over to military escort for return to his unit.

The required formalities were thus satisfied, but in order to appreciate the argument addressed to us it is convenient to set out paras. 1 to 4 and para. 9 of s. 154 of the Army Act. They are as follows: "With respect to deserters and "absentees without leave the following provisions shall have "effect:—(1.) Upon reasonable suspicion that a person is a "deserter or absentee without leave, it shall be lawful for "any constable, or if no constable can be immediately met "with, then for any officer or soldier or other person, to "apprehend such suspected person, and forthwith to bring "him before a court of summary jurisdiction: (2.) A justice "of the peace, magistrate, or other person having authority "to issue a warrant for the apprehension of a person charged "with crime may, if satisfied by evidence on oath that a deserter "or absentee without leave is or is reasonably suspected to "be within his jurisdiction, issue a warrant authorizing such "deserter or absentee without leave to be apprehended and "brought forthwith before a court of summary jurisdiction: "(3.) Where a person is brought before a court of summary "jurisdiction charged with being a deserter or absentee "without leave under this Act, such court may deal with "the case in like manner as if such person were brought "before the court charged with an indictable offence, or "in Scotland an offence: (4.) The court, if satisfied either "by evidence on oath or by the confession of such person "that he is a deserter or absentee without leave, shall "forthwith, as it may seem to the court most expedient "with regard to his safe custody, cause him either to be "delivered into military custody in such manner as the "court may deem most expedient, or, until he can be so "delivered, to be committed to some prison, police station or "other place legally provided for the confinement of persons "in custody, for such reasonable time as appears to the court "reasonably necessary for the purpose of delivering him into "military custody: . . . . (9.) Where a person surrenders "himself to a constable in the United Kingdom as being "a deserter or absentee without leave, the officer of police "in charge of the police station to which he is brought shall "forthwith inquire into the case, and if it appears to him "from the confession of that person that that person is a "deserter or absentee without leave, he may cause him to be "delivered into military custody without bringing him before "a court of summary jurisdiction under this section, and in "such case shall send to the Army Council or as they may "direct a certificate signed by himself as to the fact, date, "and place of such surrender." By s. 12 of the Army Act, "desertion," and by s. 15 "absence without leave," are declared to be offences under military law.

The law to be applied in connexion with appeals from decisions of the High Court, or of a single judge, on application for a writ of habeas corpus ad subjiciendum is well established. The speech of the Earl of Birkenhead in *Secretary of State for Home Affairs* v. *O'Brien* (1) described the nature and characteristics of the writ and laid it down—following the previous decision of this House in *Cox* v. *Hakes* (2)—that "if the writ is once directed to issue, and discharge is ordered "by a competent court, no appeal lies to any superior court." Lord Halsbury L.C. in *Cox* v. *Hakes* (3) emphasized the governing principle involved when he said: "It is the right "of personal freedom in this country which is in debate; "and I for one should be very slow to believe, except it was "done by express legislation, that the policy of centuries has "been suddenly reversed and that the right of personal "freedom is no longer to be determined summarily and finally, "but is to be subject to the delay and uncertainty of ordinary "litigation, so that the final determination upon that question "may only be arrived at by the last Court of Appeal." If, however, the application for the writ of habeas corpus is refused, and the question arises whether an appeal lies against such refusal, a distinction must be made. If the judgment of the High Court refusing the writ is in any criminal cause or matter no appeal lies. If it is not, an appeal is competent. This distinction between cases of habeas corpus in a criminal matter, and cases when the matter is not criminal goes back very far. The Habeas Corpus Act, 1679 (which improved the common-law remedy in various ways), applied only to cases where persons were detained in custody for some criminal matter. Similar statutory improvements in non-criminal cases were not made till the Habeas Corpus Act, 1816. The distinction is noteworthy, though in fact (as Blackstone, writing in 1768, points out (vol. iii., p. 137)) in non-criminal cases, the practice of judges, when granting writs of habeas corpus at common law, was to comply with the spirit of the Act of 1679. As regards the right to appeal, it has been consistently held that there is no right of appeal from the refusal of the writ in extradition proceedings (*Ex parte Woodhall* (1)) or in proceedings under the Fugitive Offenders Act, 1881 (*Rex* v. *Brixton Prison* (*Governor of*). *Ex parte Savarkar* (2)). It will be observed that these decisions, which I accept as correct, involve the view that the matter in respect of which the accused is in custody may be "criminal" although he is not charged with a breach of our own criminal law, and (in the case of the Fugitive Offenders Act), although the offence would not necessarily be a crime at all if committed here. It is the nature and character of the proceeding in which habeas corpus is sought which provide the test. If the matter is one the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal. This is the true effect of the "two conditions" formulated by Viscount Cave in *In re Clifford and O'Sullivan* (3).

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(1) [1923] A. C. 603, 609.
(2) (1890) 15 App. Cas. 506.
(3) Ibid. 522.

Applying these tests, I cannot doubt that the appellant's application for the writ and the decision of the Divisional Court refusing it were "in a criminal cause or matter." He has been apprehended by the police on suspicion of being a deserter or absentee without leave from the Dutch forces, and is being brought before a court of summary jurisdiction on these charges by a procedure analogous to that of s. 154 of the Army Act, so that the court, if "satisfied," may deal with him as provided in sub-s. 4 of that section. Mr. Slade was driven to contend, in one part of his argument, that if the appellant were a British subject, charged with being a deserter or absentee without leave under s. 154, he could appeal against a refusal of the writ. Having regard to the meaning and consequences of "desertion" and "absence "without leave" in the Act, this is plainly not so. I agree with Goddard L.J. (1) that it would be unduly pedantic to require formal proof that a Dutch conscript deserting or absent without leave from his unit in time of war is liable to be charged with an offence against the military law of his country. The proceedings in the present case are for the direct purpose of handing the appellant over so that he may be dealt with on these charges. Whether they are hereafter withdrawn or disproved does not affect the criminal character of the matter in the least: see, as to this, the observations of Lord Esher M.R. and of A. L. Smith L.J. in *Seaman* v. *Burley* (2).

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(1) (1888) 20 Q. B. D. 832.
(2) [1910] 2 K. B. 1056.
(3) [1921] 2 A. C. 570, 580.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion which has just been delivered by my noble and learned friend on the woolsack, and I concur in that opinion.

LORD WRIGHT. My Lords, your Lordships have already announced the decision of the House that this appeal is dismissed and the order of the Court of Appeal affirmed. My noble and learned friend the Lord Chancellor has explained in his speech the reasons which have influenced your Lordships. I agree with his statement and merely add a few observations.

The Lord Chancellor has recapitulated the relevant facts and the statutory provisions, and has explained the nature and course of the proceedings. The two decisions of the Divisional Court discussed with particularity important questions of English and of Dutch law. As to what was there said I express no opinion, because in this House, as in the Court of Appeal, the matter is concluded on the simple ground that under s. 31, sub-s. 1 (*a*), of the Judicature Act, 1925, there is no appeal from the order of the Divisional Court which the appellant seeks to attack. I merely refer to the general position so far as may be necessary to justify the conclusion that there is no appeal.

The appellant, though a Dutch national, is and has been resident in this country. He is subject to the law of this country and is also entitled to its protection and to the

(1) [1942] 2 K. B. 26, 31.

(2) [1896] 2 Q. B. 344, 347, 351.

privileges which belong to one who lives within the King's peace. In particular, he is entitled to the rights to personal freedom which English law gives him, including the right to seek to safeguard his liberty by the remedy of habeas corpus or other procedure which may be available, but English law has in his case introduced a special qualification, under the Allied Forces Act, 1940, and the Order in Council (St. R. & O., 1940, No. 1818). Under these provisions, which are set out by the Lord Chancellor, the appellant is liable to be apprehended and dealt with by the appropriate court on a charge that he is a deserter or absentee without leave from the Dutch forces in this country in substantially the same manner as a member of the British forces might be dealt with on a similar charge. If that charge is brought to the appropriate tribunal, generally a single magistrate, he may cause him to be handed over to the military custody of the Dutch authorities. The magistrate, having before him the person who is charged with being a deserter or absentee without leave, is to "deal with the case in like manner as if the person were "brought before the court charged with an indictable offence, "or in Scotland an offence." These last words, which, no doubt, refer in part to procedure, empower the magistrate to deliver over the person charged into military custody to be dealt with by the appropriate judicial procedure, that is, by court martial, or, in the case of lesser offences, by a superior officer. This jurisdiction is analogous to that of the magistrate to commit a person charged for trial at assizes or quarter sessions. The person charged before a magistrate under the Allied Forces Act or the order, if handed over to military custody may be dealt with by the appropriate military tribunal and either acquitted or convicted of the military offence of desertion or absence without leave, and, if convicted, he may be sentenced by the tribunal to such punishment as the tribunal deems proper. English law is not concerned with the course of these military proceedings once the English court has decided that the man is subject to Dutch military law, and that there is a prima facie case that he is a deserter or absentee without leave. It is, however, a condition that the man is subject to Dutch military law, and proceedings in habeas corpus are competent to raise that issue as was held in the famous case of *Rex* v. *Wolfe Tone* (1). The magistrate's decision may be challenged in other ways as, for example, by a case stated or by proceedings for mandamus or certiorari.

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(1) (1798) 27 St. Tr. 614.

It is clear that the statutory provisions here in question involve a peculiar interference with the freedom of a person resident in this country. He may under them be subjected to a special jurisdiction, no doubt similar to that to which a person subject to British military law is subject, but vitally different in that he is subjected to a foreign jurisdiction and code of law, that of the Dutch government enforcing its military law. There is, therefore, introduced a species of extra-territorial jurisdiction however limited, and the Dutch service courts are given jurisdiction to enforce their sentences. But this jurisdiction is only possible so far as it is authorized by the British legislature and can only be exercised in accordance with the statutory provisions referred to and subject to the conditions and safeguards specified by statute. In particular, the British court must be satisfied that the person in question is subject to Dutch military law and is, prima facie at least, an offender against that law. In these matters the British court has jurisdiction and the person concerned is entitled to exercise all the rights which British law affords to safeguard his legal liberty. Thus, in the present case, the magistrate, in the first instance, might have discharged the appellant in accordance with the provisions of s. 154, and the proceedings would then have been at an end. In actual fact, the matter was dealt with on the application for habeas corpus made to the two Divisional Courts in succession. These courts dealt with the merits of the case and refused to discharge the appellant. If there is no appeal from the order of discharge the order must remain effective. Your Lordships have held, agreeing with the Court of Appeal, that s. 31, sub-s. 1 (*a*), of the Judicature Act, 1925, excludes an appeal, because the order of the Divisional Court is a judgment of the High Court in a criminal cause or matter within the meaning of the subsection. The Divisional Courts held that the appellant is subject by Dutch law to Dutch military law, and that he was charged with offences under that law, and was liable to be dealt with under the Allied Forces Act and the order. The question which has been debated is whether the order of the Divisional Court is one made in a criminal cause or matter. Counsel for the appellant have strenuously contended that it is not such an order on various grounds.

The words " cause or matter " are, in my opinion, apt to

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include any form of proceeding. The word "matter" does not refer to the subject-matter of the proceeding, but to the proceeding itself. It is introduced to exclude any limited definition of the word "cause." In the present case, the immediate proceeding in which the order was made was not the cause or matter to which the section refers. The cause or matter in question was the application to the court to exercise its powers under the Allied Forces Act and the order, and to deliver the appellant to the Dutch military authorities. It is in reference to the nature of that proceeding that it must be determined whether there was an order made in a criminal cause or matter. That was the matter of substantive law. The writ of habeas corpus deals with the machinery of justice, and is essentially a procedural writ, the object of which is to enforce a legal right. The application for habeas corpus may or may not be in a criminal cause or matter. The former class of cases was dealt with in the Habeas Corpus Act, 1679; the reforms of procedure in the latter class had to wait until the Act of 1816. As a few instances of non-criminal cases of habeas corpus, there may be instanced, *Reg.* v. *Jackson* (1); *Reg.* v. *Barnardo. Jones's Case* (2); *Barnardo* v. *Ford* (3); and *Cox* v. *Hakes* (4). Applications in criminal causes or matters are more numerous. The few instances which I cite later are chosen merely to illustrate the wide meaning given to the words "criminal cause or matter" used in the section, or in the similar provision of the Supreme Court of Judicature Act, 1873, contained in s. 47. It is not easy, or, perhaps, desirable, to attempt a precise or comprehensive definition of these words. In *Provincial Theatres, Ld.* v. *Newcastle-on-Tyne Profiteering Committee* (5), a case of certiorari, this House held no appeal was competent. A local committee charged with the duty of investigating and, if it seemed necessary, of initiating proceedings in respect of profiteering offences for which fine or imprisonment might be imposed, directed a prosecution. A rule nisi for a certiorari was claimed on the ground that the resolution was invalid by reason that certain members of the committee were disqualified. The rule was discharged by the court, and it was held that no appeal lay from that order. Lord Sumner said (6) that the resolution was a criminal matter "because in one unbroken proceeding, although no doubt

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(1) [1891] 1 Q. B. 671.
(2) [1891] 1 Q. B. 194.
(3) [1892] A. C. 326.
(4) 15 App. Cas. 506.
(5) (1921) 90 L. J. (K. B.) 1064.
(6) Ibid. 1068.

"by various steps or processes, the termination of the whole "matter was fine or imprisonment." Lord Sumner meant "might be" fine or imprisonment. This is clear from what Lord Birkenhead said (1) of *Ex parte Pulbrook* (2), which he cited with approval. The order of the High Court in question in that case was the order of a judge in chambers allowing a criminal prosecution to be commenced against a party responsible for the publication of a libel in a newspaper. Lord Birkenhead observed that the judge's order need not be followed by any proceedings at all. The person who obtained the order might not initiate a prosecution, yet it was held that no appeal lay because the order was made in a criminal matter. *Ex parte Woodhall* (3) has been consistently upheld and approved by later courts, as for instance, by Lord Birkenhead in the case in this House just cited (1). The Queen's Bench Division in *Woodhall's* case (3) had refused a writ of habeas corpus at the instance of a person committed to prison under the Extradition Act, 1870, and it was held that no appeal lay. Lord Esher said that: "The intention was that no appeal "should lie in any 'criminal matter' in the widest sense of "the term, this court being constituted for the hearing of "appeals in civil causes and matters." He quoted with approval the opinion of Mellish L.J. in *Reg.* v. *Fletcher* (4), that an order made in a proceeding taken in the Queen's Bench Division to quash a conviction before magistrates was a criminal proceeding. The lord justice said that "the "intention of the legislature appears to me clearly to have "been to leave the procedure in criminal cases substantially "unaltered," that is, compared with the procedure before the Judicature Act of 1873. In *Rex* v. *Garrett* (5) the Court of Appeal held that no appeal lay from the order of the King's Bench Division, discharging on the merits a rule nisi for a prohibition against a magistrate on the ground that he had no jurisdiction to hear the charge brought against certain foreign subjects arrested from their ship, and charged with offences against the Defence Regulations. The order was made, it was held, in a criminal cause or matter. In *Rex* v. *Brixton Prison (Governor of). Ex parte Savarkar* (6), it was held that an appeal does not lie to the Court of Appeal against a refusal of a Divisional Court to issue a writ of habeas corpus in the case of a prisoner committed under the Fugitive Offenders Act.

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(1) 90 L. J. (K. B.) 1064, 1067.

(2) [1892] 1 Q. B. 86.

(3) 20 Q. B. D. 832, 835.

(4) (1876) 2 Q. B. D. 43, 44.

(5) [1917] 2 K. B. 99.

(6) [1910] 2 K. B. 1056.

These authorities are sufficient to explain the wide application of the section and dispose of the objections taken on behalf of the appellant to which I shall refer. I must, however, cite *In re Clifford and O'Sullivan* (1), where the appeal was dismissed on the ground that the order impeached was not made in proceedings before a military court or court martial or, it appears, any court at all, and could not be described as made in a criminal cause or matter. Viscount Cave (2) said there must be two conditions fulfilled to satisfy the word "criminal" There must be the consideration of some criminal offence charged under criminal law, and the charge must be preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. What I think Viscount Cave was particularly emphasizing was the latter condition. In his opinion, the military officers who purported to try the men and pass sentence, were in no possible sense a court martial or a court of any kind.

The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a "criminal cause or matter." The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by *Ex parte Woodhall* (3) and *Rex* v. *Brixton Prison* (*Governor of*). *Ex parte Savarkar* (4). These conditions are fulfilled by the order in the present case. The court was empowered by English law to make the order which subjected the appellant to the risk of punishment by

(1) [1921] 2 A. C. 570.
(2) Ibid. 580.
(3) 20 Q. B. D. 832.
(4) [1910] 2 K. B. 1056.

Dutch law. It is, I think, within the principle which I have extracted from the cases. It only differs from an extradition case in that the foreign authority which has power to try and punish, exercises that power in England, in virtue of the special provisions of the Allied Forces Act and order, all the conditions of which have been fulfilled.

The Divisional Court has held that the offences charged are military offences by Dutch law. If it were material here to decide that, I should agree with Goddard L.J. on that part of his judgment as I do with his judgment generally. The English Army Act by ss. 12 and 15 respectively provides that both desertion and absence without leave are offences punishable by military tribunals by imprisonment and fine. The certificate from the Dutch military officer given in this case confirms the presumption that the Dutch military code resembles on this point the English Army Act. The Allied Forces Order expressly applies s. 154 of the English Army Act (mutatis mutandis) to deserters and absentees without leave from the Dutch military forces. The authorities already cited dispose of the contentions strenuously pressed on behalf of the appellant based on the possibility that the appellant after being handed over to the Dutch authorities may never be tried, found guilty or sentenced. The question has to be judged as at the date when the court made the order. The proceedings put the appellant in jeopardy. In my opinion, the order made by the Divisional Court was one from which no appeal lay.

LORD PORTER (read by Lord Thankerton). My Lords, I agree that this appeal should be dismissed for the reason that it was not competent for the Court of Appeal to entertain it, and I only add a few words of my own to what has already been said because of the importance of the topic and out of respect to the interesting and forcible argument which has been addressed to your Lordships' House. The question whether a right of appeal does or does not exist is now governed by s. 31, sub-s. 1 (*c*), of the Supreme Court of Judicature Act, 1925. The wording is " No appeal shall lie except as provided "by the Criminal Appeal Act or this Act from any judgment "of the High Court in any criminal cause or matter."

Was, then, the application for the writ of habeas corpus in the present case made in a "criminal cause or matter"? Certain principles have been consistently followed in coming to

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a conclusion on this question, and are now, I think, too firmly established to be open to challenge. One such principle is that mandamus may be asked for either in a criminal or in a civil proceeding and in any given case it must be determined whether the proceeding is criminal or not. This does not mean that the matter, to be criminal, must be criminal throughout. It is enough if the proceeding in respect of which mandamus was asked is criminal, e.g., the recovery of a poor rate is not of itself a criminal matter, but its enforcement by magistrates by warrant of distress is, and, if a case be stated by them as to their right so to enforce it and that case is determined by the High Court, no appeal lies: see *Seaman* v. *Burley* (1). So, if the proceeding before the magistrate was a criminal proceeding the decision of the High Court on a writ of prohibition is a decision in a criminal matter whether the magistrate had jurisdiction or not. He purported to be exercising criminal not civil jurisdiction, and the decision of the High Court was given in that matter: see per Viscount Cave in *In re Clifford and O'Sullivan* (2). As long ago as 1888 it was unsuccessfully argued in *Ex parte Woodhall* (3) that the decision, to be in a criminal cause or matter, must deal with what was a crime by English law and in the same case it was contended in vain that an application for habeas corpus was a separate proceeding from that which the magistrate dealt with in the case brought before him. That case has been consistently approved by the courts of this country, and, I think, at least once by your Lordships' House: see *Provincial Cinema Theatres, Ld.* v. *Newcastle-on-Tyne Profiteering Committee* (4). The proceeding from which the appeal is attempted to be taken must be a step in a criminal proceeding, but it need not itself of necessity end in a criminal trial or punishment. It is enough if it puts the person brought up before the magistrate in jeopardy of a criminal charge: see *Ex parte Pulbrook* (5), and *Rex* v. *Brixton Prison (Governor of). Ex parte Savarkar* (6).

If these principles be sound, and I believe they are, the only remaining question is whether the appellant, when he was brought before the magistrate, was put in peril of trial and punishment upon a criminal charge. It was urged before your Lordships that the only object, so far as is material to the present case, of the Allied Forces Act, 1940, and the order made thereunder is to enable an alleged deserter or person absent without leave to be handed over to the military authority of his own country and that no prosecution nor any criminal proceeding need follow. Indeed, it was said that the same result followed in the case of a member of the British forces if charged with being a deserter or absentee without leave. It is true that in either case a prosecution need not follow nor need even a charge be preferred, but this is true of all proceedings before magistrates in indictable cases, and an absentee or deserter charged before a magistrate has at least this in common with one charged with an indictable offence that by s. 154, sub-s. 3, of the Army Act he may be dealt with in the same manner. But in any case an Englishman so charged is plainly in peril of being tried before and punished by a military court.

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(1) [1896] 2 Q. B. 344.
(2) [1921] 2 A. C. 570.
(3) 20 Q. B. D. 832.
(4) 90 L. J. (K. B.) 1064.
(5) [1892] 1 Q. B. 86.
(6) [1910] 2 K. B. 1056.

It was argued, however, that, although an Englishman might be in jeopardy from an English court martial, yet there was no evidence as to the Dutch law in the matter, and that an absentee without leave, at any rate if he had a reasonable excuse, might be subject to discipline but not guilty of any crime. The answer is, I think, to be found in the words of Goddard L.J. in the course of his judgment when he says (1): "We do not think that this court is bound to require formal "proof that a soldier deserting or absent without leave from "his unit in time of war is guilty of an offence against the "military law of his country." Finally it was suggested that, in order that a matter may be a criminal cause or matter, it must fulfil the two conditions laid down by Viscount Cave in *In re Clifford and O'Sullivan* (2): it must involve the consideration of some charge of crime, i.e., of an offence against the public law, and that charge must be preferred or be about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for this offence or alleged offence. For the purpose of deciding the case then in question, these conditions were sufficiently explicit, but I do not think they were, or purported to be, an exact definition of a criminal cause or matter. The present case does fulfil the first requirement and, though the charge will not necessarily either be preferred or be about to be preferred before any tribunal, yet the appellant was put in jeopardy of having a criminal charge preferred against him

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(1) [1942] 2 K. B. 26, 31.

(2) [1921] 2 A. C. 570, 580.

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before a judicial tribunal claiming jurisdiction to impose punishment for the offence. *Ex parte Pulbrook* (1) and *Rex* v. *Brixton Prison* (*Governor of*). *Ex parte Savarkar* (2) are authorities for the proposition that it is not necessary that the charge must be preferred or must be about to be preferred before such a court. It is enough that it may be about to be so preferred. I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Lewis & Lewis and Gisborne & Co.*

Solicitor for the Home Secretary: *Treasury Solicitor.*

Solicitors for the Defence Minister of the Royal Netherlands Government: *Stephenson, Harwood & Tatham.*

(1) [1892] 1 Q. B. 86. (2) [1910] 2 K. B. 1056.

[HOUSE OF LORDS.]

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July, 17, 20, 21, 23; *Sept.* 8.

NATIONAL ASSOCIATION OF LOCAL GOVERNMENT OFFICERS . . . APPELLANTS;

AND

BOLTON CORPORATION . . . . . RESPONDENTS.

Emergency legislation—Local government—Officers on war service—Refusal of local authority to make up war service pay to level of civilian remuneration—Reference of dispute by Minister of Labour to National Arbitration Tribunal—" Trade dispute "—" Workmen "—Discretion of local authority—Industrial Courts Act, 1919 (9 & 10 *Geo.* 5, *c.* 69), *s.* 8—*Local Government Staffs* (*War Service*) *Act,* 1939 (2 & 3 *Geo.* 6, *c.* 94), *s.* 1, *sub-ss.* 1, 2—*Conditions of Employment and National Arbitration Order,* 1940 (*St. R. & O.,* 1940, *No.* 1305), *Part I., art.* 2; *Part V., art.* 7.

By s. 1 of the Local Government Staffs (War Service) Act, 1939, local authorities are empowered to make up the remuneration of officers who cease to serve them in order to undertake war service in the forces of the Crown or in civil defence to the level of the remuneration which those officers would have received if they had continued to serve in their civil capacity. The respondents, Bolton Corporation, decided by resolution that they would not exercise in favour of officers who might engage in war service the power given by the Act. Thereupon, the appellants,

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**Present*: VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD WRIGHT and LORD PORTER.

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the National Association of Local Government Officers, on behalf of their members who were officers employed by the respondents, notified the Ministry of Labour that there was in existence a dispute between the respondents and those officers, and the Minister of Labour, acting under the Conditions of Employment and National Arbitration Order, 1940, referred it as a "trade "dispute" to the National Arbitration Tribunal, constituted under Part I., art. 1, of that order. The respondents applied for an order prohibiting the tribunal from adjudicating on the dispute.

The Conditions of Employment and National Arbitration Order, 1940, contained in Part V., art. 7, the following definitions which were identical with those contained in the Industrial Courts Act, 1919: " . . . . 'trade dispute' means any dispute or difference between "employers and workmen, or between workmen and workmen "connected with the employment or non-employment, or the "terms of the employment or with the conditions of labour "of any person . . . . 'workman' means any person who has "entered into or works under a contract with an employer, whether "the contract be by way of manual labour, clerical work or "otherwise, be expressed or implied, oral or in writing and whether "it be a contract of service or of apprenticeship or a contract "personally to execute any work or labour":—

Held, (1.) (Lord Thankerton dubitante) that a dispute as to conditions of service of officers of a municipal corporation was a "trade dispute," and (2.) that administrative, professional and technical officials of the corporation were "workmen" within the definitions in the order; (3.) that a dispute as to payments to be made by the respondents, under s. 1 of the Local Government Staffs (War Service) Act, 1939, to their officers after they had ceased to serve them in order to undertake war service was a dispute connected with the terms of their employment within the meaning of the definition of "trade dispute," since an agreement by a local authority to make such a payment became a contractual term of the officer's employment and was not a mere gratuity which, though promised, could be withheld at pleasure; (4.) that the respondents had power to determine generally in advance whether they would make-up the pay of such of their officers as might undertake war service and need not exercise their statutory discretion by considering the case of each individual officer when he ceased to serve them in order to undertake war service.

Decision of the Court of Appeal (sub nom. *Rex* v. *National Arbitration Tribunal. Ex parte Bolton Corporation*) [1941] 2 K. B. 405 reversed.

APPEAL from the Court of Appeal.

The facts, stated by Lord Wright, were as follows: The respondents, Bolton Corporation, on various occasions between September, 1939, and April, 1940, considered the question of exercising the power given to local authorities by the Local

Government Staffs (War Service) Act, 1939, to make up the pay of officers who ceased to serve them in order to undertake war service to the level of the remuneration they would have received if they had continued to serve in their civil capacity. They passed resolutions that they would not take any action under the Act. In view of these resolutions the appellants, the National Association of Local Government Officers, a trade union, acting on behalf of members who were employees of the respondents, formally claimed that it should be a condition of their employment with the respondents that the respondents should make up to them the difference between their pay if they served in the forces of the Crown or in civil defence and the remuneration which they would have received if they had remained in the service of the respondents. They, accordingly, reported the matter to the Minister of Labour and National Service who on February 4, 1941, referred it to the National Arbitration Tribunal under art. 2 of the Conditions of Employment and National Arbitration Order, 1940. That reference was as follows: " Whereas on August 21, "1940, a trade dispute existing or apprehended between the "National Association of Local Government Officers on the "one hand and the Bolton Corporation, Town Hall, Bolton, "on the other hand, was reported to the Minister of Labour "and National Service (hereinafter referred to as ' the "' Minister ') by the National Association of Local Government "Officers (being one of the parties to the said dispute), arising "out of a claim that it shall be a condition of service of officers "in the employment of the corporation that in the event of "their serving in His Majesty's Forces or in civil defence "they shall have made up to them the difference between "their new pay and the remuneration which they would "have received if they had remained in the actual service of "the corporation: Now therefore the Minister in exercise "of the powers conferred on him by art. 2 of the Conditions "of Employment and National Arbitration Order, 1940, "hereby refers the said dispute for settlement to the National "Arbitration Tribunal." Thereupon the respondents applied to the High Court for an order of prohibition to prohibit the tribunal from adjudicating on the dispute. They relied on the provisions of the Act of 1939 and the order of 1940. The Divisional Court (Viscount Caldecote C.J. and Tucker J., Atkinson J. dissenting) (1) dismissed the application, holding

(1) [1941] 1 K. B. 584.

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that the tribunal had the required jurisdiction. The Court of Appeal (MacKinnon L.J., du Parcq L.J., and Bennett J.) (1) held that it had not jurisdiction and prohibited it from adjudicating on the dispute. The appellants appealed to the House of Lords.

Blanco White K.C., *Simes* and *Parrish* for the appellants. This is a " trade dispute " within the meaning of art. 7 of the order of 1940, and, therefore, was properly submitted to the tribunal. There is nothing in the order or in the Industrial Courts Act, 1919, s. 8 of which contains an identical definition, to limit the meaning of the words used. The definition is virtually the same as that contained in s. 5, sub-s. 3, of the Trade Disputes Act, 1906, but under that Act the definition of " workman " is different, requiring the man to be " employed "in trade or industry." Those words are not found in the definition in art. 7, but in any event the definition of " trade "or industry " there "includes the performance of its functions "by a local authority." That means the performance of all its functions, and, accordingly, administrative, professional and technical officials of a local authority, though not " work-"men " in ordinary parlance, are " workmen " within the definition in art. 7. The words " by way of manual labour, "clerical work, or otherwise " do not bring into operation the ejusdem generis rule for " manual labour " and " clerical "work " do not belong to one limited genus. Further, the definition does not contain any such limit as that which is found in the Workmen's Compensation Act, 1925, s. 3, sub-s. 1. [They referred to *Simmons* v. *Heath Laundry Co.* (2) and *Walker* v. *Crystal Palace Football Club, Ld.* (3)]. If the respondents are applying for an order of prohibition on the ground that the officers in question are not "workmen " within the definition, the onus of proof lies on them and they have not discharged it. The intention of the order is expressed in the preamble where it is said that it is made " with a view to "preventing work being interrupted by trade disputes." That is a reason for not limiting its scope to humble persons, since the more important the person involved, the more important the dispute. It is contended by the respondents that the Act of 1939 merely confers on local authorities the power to make ex gratia payments in their discretion, so that

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(1) [1941] 2 K. B. 405.

(2) [1910] 1 K. B. 543, 548, 549.

(3) [1910] 1 K. B. 87, 92, 93.

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if the tribunal made an award it would be purporting to interfere with a statutory discretion, but an agreement by a local authority to make such a payment as is contemplated in the Act becomes a term of the officer's contract of employment, and this dispute was connected with the terms of the employment of the officers in question within the definition of a "trade dispute." A local authority may determine beforehand by general resolution to make up the salaries of its officers who have taken up war service. Nothing in s. 1 of the Act suggests that a determination must be made in the case of each individual officer at the time when they cease to serve the local authority. A resolution by the respondents that they would confer on all their officers the benefits which the Act empowers them to confer would be valid and intra vires, for a local authority in this connexion is in the same position as the directors of a limited liability company. A corporation has all the powers of a private individual save in so far as they are limited by its charter or by statute : see *Attorney-General* v. *Leeds Corporation* (1) ; *Attorney-General* v. *Manchester Corporation* (2) ; *Wenlock* v. *River Dee Co.* (3). [They also referred to *Wardell* v. *Kent County Council* (4) ; *Roper* v. *Hussey-Freke* (5) ; *Roberts* v. *Hopwood* (6) ; *Ex parte Mellish* (7) ; *Holloway* v. *Poplar Corporation* (8) ; *Budgett* v. *Stratford Co-operative and Industrial Society, Ld.* (9) ; *Shipton* v. *Cardiff Corporation* (10) ; *Davies* v. *Rhondda Urban District Council* (11) and the Local Government Superannuation Act, 1937.]

Sir Donald Somervell A.-G., *Sir Maxwell Fyfe S.-G.* and *W. A. Davies* for the Minister of Labour and National Service. The expression " trade dispute " in the order of 1940 and in reg. 58AA of the Defence (General) Regulations, under which it was made, bears the same meaning as in the Industrial Courts Act, 1919. It covers disputes between local authorities and their employees. The expression " workman " in the order covers professional, technical and administrative employees. These are brought in by the words " or otherwise " in the definition in art. 7 referring to a contract " by way of "manual labour, clerical work or otherwise." The fact that a claim or request which leads to a dispute is made by a trade

(1) [1929] 2 Ch. 291, 295.
(2) [1906] 1 Ch. 643, 651.
(3) (1887) 36 Ch. D. 674, 685.
(4) [1938] 2 K. B. 768.
(5) [1915] 3 K. B. 222.
(6) [1925] A. C. 578.
(7) (1863) 8 L. T. 47.
(8) [1940] 1 K. B. 173.
(9) (1916) 32 T. L. R. 378.
(10) (1917) 87 L. J. (K. B.) 51.
(11) (1917) 87 L. J. (K. B.) 166.

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union does not prevent it from being a trade dispute and the actual existence or danger of a strike or lock-out is not a necessary condition precedent to the existence of a trade dispute. The application of the order of 1940 to the respondents is not inconsistent with the terms of s. 1 of the Act of 1939, or ss. 105, 106 and 107 of the Local Government Act, 1933, dealing with the appointment and payment of officers of local authorities. There are similar provisions in s. 2, sub-s. 6, of the London Passenger Transport Act, 1933, and s. 430 of the Port of London (Consolidation) Act, 1920. Such words are used to give a statutory body or a local authority power to pay wages and salaries. They do not confer a judicial discretion designed to protect the money in its hands. They enable such a body to lay down a general scale of payment. Under the Act of 1939 the respondents have power to lay down a general policy with regard to the payments which it permits. There is nothing in s. 1 of the Act inconsistent with the provision for compulsory arbitration in the order of 1940. Further, even if there were, the position is provided for by s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939: "A defence regulation and any order, "rule or bye-law duly made in pursuance of such a regulation "shall have effect notwithstanding anything inconsistent "therewith contained in any enactment other than this Act." [They referred to *Brimelow* v. *Casson* (1); *Roberts* v. *Hopwood* (2); *Roberts* v. *Cunningham* (3); *Woolwich Corporation* v. *Roberts* (4); *Rex v. Port of London Authority. Ex parte Kynoch, Ld.* (5); the Trade Boards Act, 1909, and the Trade Boards Act, 1918.]

Turner K.C. and *Neep* for the respondents. The tribunal has no jurisdiction to entertain this arbitration. It would be beyond the powers of the respondents to incorporate in the terms of employment of their employees the term claimed by the appellants. Under s. 1 of the Act of 1939 a power is conferred on them, but a duty is also imposed to exercise a discretion in respect of each employee at the time when he ceases to serve them or subsequently. Accordingly, they cannot determine generally in advance whether to make up the pay of such of their officers as undertake war service. The payments cannot be made as a matter of routine and the

(1) [1924] 1 Ch. 302, 313.
(2) [1925] A. C. 578, 600.
(3) (1925) 134 L. T. 421.
(4) (1927) 96 L. J. (K. B.) 757.
(5) [1919] 1 K. B. 176.

respondents must bring their mind to bear on each individual case by considering (1.) whether to make payments or not, and (2.) what the amount of the payments should be, i.e., whether the officer's salary should be made up wholly or partially. The respondents should distinguish between the cases of the different men called up for war service. Thus, there is a proper distinction between the case of a married man with a large family who has served them for several years and a bachelor who has only served them for a month. It would be impossible to render complete justice to everyone by a wholesale decision. The real object of the Act of 1939 was not to encourage enlistment, since men are not now free to decide when they will join the forces, but to relieve the men called up from anxiety as to what was happening at home. It was to enable local authorities to do what other large employers of labour are doing, but restrictions were imposed which do not affect private employers. It was suggested that the respondents, being a charter corporation, could do anything that a private individual could do, but it is also a municipal corporation, and is, therefore, subject to many restrictions imposed by statute. In making payments out of the moneys in their hands the respondents are in a fiduciary position and owe a duty to their ratepayers : see ss. 185 and 186 of the Local Government Act, 1933. An employee who is called into the forces has severed his connexion with the local authority and its power to pay him remuneration under that Act ceases. His contract has been frustrated and his employment is determined, not just suspended. Thus, it is of the essence of the payments under the Act of 1939 that they should be ex gratia, a gratuity which the local authority may give or not at pleasure and can withdraw at any moment. The Act was designed to keep the situation fluid. The decision of a local authority to make such payments confers no legal rights, and the decision may be reconsidered if circumstances change. The payments are different in kind from salary paid under s. 106 of the Act of 1933. They are not remuneration, which is a reward for services rendered, because they are made to persons who have ceased to serve the local authority. The Act of 1939 is really linked with s. 11 of the Local Government Superannuation Act, 1937, which deals with gratuities, and not with the sections of the Act of 1933 which deal with salaries, since, apart from statute, a local authority has no power to grant a gratuity to its servants. Because the

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Government Staffs (War Service) Act, 1939, is dealing not with contracts but with ex gratia payments, s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, does not come into operation at all. Further, if the tribunal could turn that which is a gratuity into a contractual obligation in the case of a local authority, it could do so in the case of a private employer, so that any employee could demand such a term in his contract. That could not have been the intention of the legislature. Therefore, since this matter relates to ex gratia payments, it is not "connected with . . . . the terms of the "employment" of the officers in question so as to be a "trade "dispute" within art. 7 of the order of 1940, and, accordingly, the tribunal has no jurisdiction. [They referred to *Reg.* v. *St. Pancras Vestry* (1); *Holloway* v. *Poplar Corporation* (2); *Marshall* v. *Glanvill* (3); *Ex parte Mellish* (4).] Further, a dispute relating to the conditions of service of officers of a municipal corporation cannot be a "trade dispute," within the definition in art. 7 of the order of 1940 in which there is nothing to indicate any intention to depart from the ordinary meaning of the word "trade." The Emergency Powers (Defence) Act, 1939, in s. 1, sub-s. 1, refers to "maintaining "supplies and services essential to the life of the community," words relating primarily to production. The Defence (General) Regulations were made under the authority of that Act and it was by virtue of reg. 58AA that the Minister made the order of 1940. The marginal note to that regulation is: "Avoidance of strikes and lock-outs." The regulation clearly relates to industry. [They referred to the Trade Disputes Act, 1906, s. 5, sub-s. 3, and the Industrial Courts Act, 1919, s. 8.] Although in the order of 1940 "trade or industry" is defined as including "the performance of its functions by "a public or local authority," that can only refer to such workers as typists, omnibus or tramway men or scavengers. It cannot refer to members of the appellant association who are in general higher officials of the respondent corporation and its administrative staff. These cannot come within the definition of a "workman" in art. 7 of the order. The words "manual labour, clerical work, or otherwise" in the definition beings into operation the ejusdem generis rule. Thus, manual and clerical workers may be engaged in trade or industry, while a night watchman would be engaged in neither but

(1) (1890) 24 Q. B. D. 371, 373.
(2) [1940] 1 K. B. 173.
(3) [1917] 2 K. B. 87.
(4) 8 L. T. 47.

would be covered by the words "or otherwise." Those words, however, would not cover the administrative, professional and technical staff of a local authority.

Blanco White K.C. replied.

1942. Sept. 8 VISCOUNT SIMON L.C. My Lords, the problem raised by this appeal is a difficult one, as may be inferred from the difference in judicial opinion already expressed in regard to it.

The National Arbitration Tribunal has been constituted by the Minister of Labour and National Service under art. 1 of the Conditions of Employment and National Arbitration Order, 1940, made on July 18, 1940 (St. R. & O., 1940, No. 1305), "for the purpose of settling trade disputes which cannot "otherwise be determined." By art. 2 (1.) of the order: "If any trade dispute exists or is apprehended, that "dispute, if not otherwise determined, may be reported "to the Minister by or on behalf of either party to "the dispute . . . ." Thereupon, under art. 2 (2.), the Minister is to take suitable steps to promote a settlement, and if these steps fail, he is to refer the dispute for settlement to the National Arbitration Tribunal. By art. 4: "An employer shall not "declare or take part in a lock-out and a worker shall not "take part in a strike in connexion with any trade dispute "unless the dispute has been reported to the Ministry in "accordance with the provisions of art. 2 of this order, and "twenty-one days have elapsed since the date of the report "and the dispute has not during that time been referred by "the Ministry for settlement in accordance with the provisions "of that article." The Conditions of Employment and National Arbitration Order is made under reg. 58AA, added to the Defence (General) Regulations, 1939, by Order in Council (St. R. & O., 1940, No. 1217), which confers power on the Minister of Labour and National Service to make such an order "with a view to preventing work being interrupted "by trade disputes" (reg. 58AA (1.). It is not suggested that the regulation and the order are not validly made. By reg. 58AA (4.): "In this regulation the expression 'trade "'dispute' has the same meaning as in the Industrial Courts "Act, 1919." By s. 8 of the last-named Act: "The expression "'trade dispute' means any dispute or difference between "employers and workmen, or between workmen and workmen "connected with the employment or non-employment, or the "terms of the employment or with the conditions of labour "of any person." "The expression 'workman' means any "person who has entered into or works under a contract with "an employer whether the contract be by way of manual "labour, clerical work, or otherwise, be expressed or implied, "oral or in writing, and whether it be a contract of service or "of apprenticeship or a contract personally to execute any work "or labour." Definitions of "trade dispute" and of "workman" in exactly the same terms are reproduced in art. 7 of the order itself. This is convenient, though not strictly necessary, for the definition of "trade dispute" in the order is necessarily governed by its meaning in the regulation under which it is made, and its meaning in the regulation, as already stated, is that of the expression in the Act of 1919. Similarly, the meaning of "workman" necessarily remains unaltered, for it is an element in the definition of "trade dispute." It is worth observing that, while the definition of "trade dispute" just quoted is practically the same as in the Trade Disputes Act, 1906, s. 5, sub-s. 3, the definition of "workman" is entirely different and much wider than that in the Act of 1906. In that Act the workman had to be "employed in trade or "industry." No such limitation appears in the definition of "workman" for present purposes, and the effect is to enlarge correspondingly the conception of "trade dispute" itself.

The respondents contend that this reference is ultra vires of the Minister to make and is in excess of the jurisdiction of the tribunal to entertain for three main reasons. First, it is argued that a dispute as to conditions of service of officers of a municipal corporation is not a "trade dispute" at all. Secondly, it is contended that, even if it is, a dispute as to payments to be made by the respondents to their officers after they have ceased to serve the respondents in order to undertake war service is not a dispute connected with the terms of their employment within the definition of "trade "dispute." Thirdly, it is argued that the respondents have no power to determine generally in advance whether they will make up the pay of such of their officers as may undertake war service, but must exercise their statutory discretion to decide this, under s. 1 of the Local Government Staffs (War Service) Act, 1939, by considering the individual case when the individual officer ceases to serve the respondents in order to undertake war service. From this last contention it is sought to draw the conclusion that the tribunal has no

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jurisdiction to make an award which would force the respondents to do what they have no power to do. Certain other contentions, which find some place in Bennett J.'s judgment, namely, that there could not be a trade dispute between an employer and a trade union in the absence of proof that individuals serving the employer were themselves disputing with him, and that there could not be a trade dispute in the absence of a threat or suggestion of a strike or lock-out—were not urged by the respondents before this House and must be regarded as abandoned, but the three main contentions which I have set out were placed before us with force and ability and need careful examination.

First, as to the meaning of "trade dispute" in this connexion. Having regard to its definition for present purposes, and to the wide definition of "workman" which has to be read into it in order to ascertain its ambit, I think that the phrase can cover a dispute as to conditions of service of officers of a municipal corporation. Mr. Turner strenuously argued that such an interpretation gives no effect to the limiting word "trade." The answer is that the definition of "trade dispute" introduces no such limitation. It does not speak of disputes or differences connected with the employment or non-employment of persons "in trade" or "in trade or industry," but deliberately omits such limitation, though the limitation is to be found in the definition of "workman" in the Trade Disputes Act, 1906. If there can be a "trade" union to which the higher grades of officers of a municipal corporation can belong, it does not seem an impossible use of language to say that a dispute concerning their conditions of service may be a "trade" dispute. It was further urged on this point that administrative, professional and technical officials of the respondents are not "workmen." In the ordinary sense, they are not, but here again the definition provides the answer. They are, in my opinion, persons who have entered into contracts with the respondents "whether the contract be by "way of manual labour, clerical work, or otherwise." The definition contains no limit of earnings as does the definition of workman in the Workmen's Compensation Acts. This extended meaning of "workman" is, as Viscount Caldecote C.J. says (1): "a strained and unnatural meaning, but it is the "meaning given by the definition." The use of the words "or otherwise" does not bring into play the ejusdem generis

(1) [1941] 1 K. B. 504, 592.

principle, for "manual labour" and "clerical work" do not belong to a single limited genus. The only common class to which manual labour and clerical work can be said to belong is the broad class of "mode of service." I agree entirely with the Lord Chief Justice when he says that (1): "The "sentence is to be read as if it said 'whether by way of manual "'labour, clerical work, or some duty which is neither manual "'labour nor clerical work.'" Atkinson J. thought (2) that the insertion of "otherwise" was "regardless of grammar." The words seem to me to be used quite grammatically. As the derivation of "otherwise" shows, "or otherwise" means "or in another way." In my opinion, the first point relied on by the respondents fails.

The second point turns on the language and application of s. 1 of the Local Government Staffs (War Service) Act, 1939, which in its first three sub-sections provides as follows: "(1.) "Where a person serving in any capacity specified in the first "column of the schedule to this Act (hereafter in this section "referred to as 'his civil capacity') ceases so to serve in order "to undertake war service, the appropriate authority shall "have power to make to or in respect of him such payments "as are hereafter in this section provided. (2.) While any "such person is engaged in war service, the appropriate "authority may pay to him, or to or for the benefit of his wife "or other dependants nominated by him, a sum which shall "not exceed the remuneration which he would have received "if he had continued to serve in his civil capacity, after "deducting therefrom the amount of his war service pay. "(3.) In the event of the notification of the death of any "such person whilst engaged in war service, or of his having "become missing while so engaged, being given by the "authority competent in that behalf, the appropriate authority "may, during a period not exceeding twenty-six weeks from "the date of the notification, pay to or for the benefit of his "wife or other dependants such sum as might have been paid "to him under the last preceding sub-section if he had been so "engaged during that period. Provided that, in fixing the "sum to be paid under this subsection, regard shall be had to "any pension or other sum payable to or for the benefit of the "wife or other dependants out of public or charitable funds." Before the Act of 1939 came into force, it would have been ultra vires of the respondents to make payments (apart from

(1) [1941] 1 K. B. 584, 592.

(2) Ibid. 599.

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pensions or superannuation) to their former officers who had ceased to serve them. The previous powers of such corporations to use the ratepayers' money to pay their officers (including servants) were given by s. 106, sub-s. 2, of the Local Government Act, 1933, and were powers to pay " such reason-"able remuneration as they may determine." " Remuneration " in the Act of 1939 is defined by s. 14, sub-s. 1, to mean "salary, wages, and emoluments," and this must be the sense in which the word is used in the Act of 1933. Pensions and superannuation are dealt with in separate legislation: see Local Government Superannuation Act, 1939. The effect of s. 1 of the Local Government Staffs (War Service) Act, 1939, is to confer on the authorities therein referred to, including a local authority such as the respondents, a power to make to its ex-officers while engaged in war service the sort of payments described, and, therefore, puts the juristic entity in this respect in the same position as a natural person. While the respondents cannot make such payments except during an ex-officer's war service, it can agree beforehand with an officer that, if he ceases to serve in his civil capacity and undertakes war service, it will make such payments, and this thereupon becomes a contractual term of his employment by the respondents, just as a private individual can agree with his employee to employ him on the terms that, if the latter afterwards leaves to join the forces, he will make his service pay up to his former earnings. It is a fallacy to regard the payments authorized by the Act as mere gratuities which can in no circumstances be the subject of contract, and which, though promised, can be withheld at pleasure. If promised for good consideration, they can be enforced. I think, therefore, that the second argument of the respondents also fails.

Lastly, as to the contention that the respondents are bound to consider and decide each case when it arises, i.e., when a particular officer ceases to serve in order to undertake war service, and that the tribunal would be exceeding its powers if it made a more general award in advance, I agree with the Lord Chief Justice when he says (1): " I see nothing irregular "or in excess of the powers of the corporation, if they bind "themselves or are required by the award of the Tribunal to "bind themselves, in advance to make similar payments. "It is true this means giving up their discretion. Compulsory

(1) [1941] 1 K. B. 584, 595.

"arbitration has not always been approved as a method of "settling disputes, but if a party to a dispute is forced to "submit his case to arbitration, it is very likely he will be "deprived of a right which he would otherwise have of deciding "the matter in issue for himself. As for the question whether "such payments would be more than reasonable remuneration, "if it be assumed that the Tribunal would approve the claim, "that could only be on the ground that the payment ensuing "was justifiable as part of the reasonable remuneration of the "servant. What is reasonable remuneration is a question of "fact." Two observations fall to be made in conclusion. It is perfectly possible for the award of the tribunal, even though it be on the whole in favour of the claim of the appellants, to introduce qualifications which will prevent the full additional payment being required to be paid in every case, without regard (for example) to the length of the particular officer's service in his civil capacity or to the satisfactory character of such service, or even to the willingness of the respondents to part with him. And, secondly, it has to be remembered that the duty of the respondents in this connexion is not limited to seeing that the smallest possible amount of the ratepayers' money should be expended. The object of the order, and of reg. 58AA under which it is made, is to prevent work being interrupted by trade disputes. Moreover, the interests of the ratepayers, which the respondents seek to serve, may be served by encouraging municipal officials in proper cases to undertake war service, which, indeed, by the definition in the Act of 1939 includes civil defence services. The scheme of the Act is to give a wide discretion, with due regard to all the considerations involved, and these same considerations are to be borne in mind when the tribunal makes its award. I move that the appeal be allowed, with costs.

LORD ATKIN (read by LORD MACMILLAN). My Lords, I only propose to deal with the objection to the jurisdiction of the National Arbitration Tribunal which is based on the contention that a local authority has only received power to decide whether to make up the service pay of an official (which term includes servant) as and when he joins the forces, and after consideration by the authority of his special circumstances, and that the authority, therefore, has no power to agree with him in advance to make up his pay, still less to make it a general term of all its contracts of employment.

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It is argued, therefore, that the claim to have such a term made general is a claim to an ultra vires stipulation, and one which the arbitration tribunal has no jurisdiction to entertain. I do not so construe the provision of the Local Government Staffs (War Service) Act, 1939. The power given by s. 1 of the Act is to make payments during the war service of an employee of a local authority making up his war service pay to the amount he would have received if he had remained in the service of the local authority. The local authority was thus placed in equal position with private employers, who clearly have a similar power, and, provided with this power, I see no reason why the authority should not agree with its employees to exercise it. I see no reason for supposing that the authority can only make the payment after considering the individual needs of each servant. The statute, I venture to suggest, has a much wider scope. The intention, I should have said, obviously is to further the public welfare by encouraging the war effort, to enable local authorities, like other good employers, to secure that their servants, when they undertake war service, are not worse off financially by their change of service. With this object I see no reason why they should necessarily discriminate between those who have heavy or light domestic responsibilities or none at all, and I can see very good reason why, at an early stage of their local authority service, it should be possible to assure the servants that when they do undertake war service their financial position will be unaffected. I cannot think that the legislature did not foresee that, once the power was given, claims would be made for assurances that it would be exercised, and that the claims would be made and settled by the usual processes of collective bargaining with which sensible masters and workmen are now familiar. Indeed, it seems to me much more likely that it was anticipated that local authorities would come to general decisions rather than be put to the trouble, with possible delay, of considering the separate claims of possibly hundreds of individuals. I think that the local authorities in this matter were not only permitted, but required, to turn their minds away from a duty to the ratepayers and direct them to a duty to the public at large. I come to the conclusion, therefore, that the local authorities are given the power to make it part of the terms of employment of their servants that they will exercise their power of making up the war service pay when the servants leave their employment.

And if there be such a power there is nothing to prevent the servants claiming to have the power exercised, and if a difference arises in this matter between the authority and the servants there is nothing to prevent the Minister from referring the difference to the National Arbitration Tribunal, or to prevent that tribunal from determining the dispute. It is unnecessary to say that the tribunal has complete control on the matter. It may reject the claim altogether, or it may grant it in part or subject to conditions. The interference with the rights of the employers is no more and no less than the interference when any question of wages is referred to compulsory arbitration.

This disposes of the main objection which was cogently and clearly put before us by Mr. Turner. On the other facts of the case I can see no reason for departing from the plain words of the definition of " trade dispute " and " workman " in the Conditions of Employment and National Arbitration Order, 1940, and I see no reason for introducing into those definitions the words " in any trade or industry," which seem to me to be intentionally and significantly omitted. The terms of the order are very far-reaching, perhaps more so than has at present been appreciated, but they stand, and appear to me to justify the order of reference in this case. I agree that this appeal should be allowed.

LORD THANKERTON (read by LORD MACMILLAN). My Lords, while in other respects I agree with the reasons expressed in the speeches delivered by my noble and learned friends, the Lord Chancellor and Lord Atkin, I have grave doubts about the meaning placed by them on the words " trade dispute " in art. 2 of the Conditions of Employment and National Arbitration Order, 1940, which raises an important and far-reaching question. As I understand that none of your Lordships shares my doubts, it is unnecessary for me to consider whether they would lead to the dismissal of the appeal or not. I shall, however, shortly explain the reasons for my hesitancy.

The order of reference to the National Arbitration Tribunal, against which the respondents seek an order of prohibition, was made by the Minister of Labour under art. 2 of the Conditions of Employment Order, 1940. That order was made by virtue of the powers conferred on the Minister by reg. 58AA of the Defence (General) Regulations, 1939. In

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reg. 58AA it is provided that therein the expression "trade "dispute" should have the same meaning as in the Industrial Courts Act, 1919, and the Conditions of Employment Order—doubtless, for convenience—repeats verbatim in its definition clause, art. 7, the definition of the Act of 1919. In my opinion, the question, therefore, falls to be considered in what I may call the atmosphere of that Act, irrespective of the war-time atmosphere of reg. 58AA or the Conditions of Employment Order. Having thus cleared the air, I turn to the Act of 1919, the setting of which is relevant. Compulsory arbitration was introduced into the Munitions of War Act, 1916, Part I., in s. 3 of which the differences to which it applied were described, but they were solely concerned, directly or indirectly, with the manufacture, transport, or supply of munitions of war. After the armistice, when the Ministry of Munitions was moribund and these purposes were ending, a temporary Act was passed, pending the more mature consideration by Parliament of the expediency of continuing the principle of compulsory arbitration in peacetime. This was the Wages (Temporary Regulation) Act, 1918, which was passed on November 21, 1918. There is no doubt that that Act only rendered compulsory arbitration applicable by the Minister of Labour to differences in relation to wages in any trade or industry, and its provisions provided the foundation of the Industrial Courts Act of 1919, by which it was superseded. I cannot think that the Trade Disputes Act, 1906, which was concerned with conspiracy and protection of property in connexion with trade disputes, provides a useful analogical basis for the meaning of "trade dispute" in connexion with compulsory arbitration in the Act of 1919. Nor do I think that the omission of "trade or industry" from the definition of "workman" in the Act of 1919 is of any material significance, for, if the definition of "trade dispute" involves a restriction to trade or industry, which applies to both employers and workmen, the insertion of the restrictive words in the definition of "workman" would be superfluous. The definition of "trade dispute" in the Act of 1919 appears to me to be incomplete, and, therefore, inconclusive. It may mean either of two things, namely, (1.) the expression "trade dispute" means any dispute or difference in any trade or industry, or (2.) the expression "trade dispute" means any dispute or difference, whether in a trade or industry or not. In dubio, I would feel bound to adopt the first of these alternatives, as involving less interference with contractual freedom. I do not propose to pursue the matter further, but I may add that s. 7 of the Census of Production Act, 1906, rather suggests that the exercise and performance by a local or other public authority of its powers and duties would not normally be regarded as a trade or business.

LORD WRIGHT. My Lords, the substantial question at issue was whether there was a "trade dispute" within the meaning of the Conditions of Employment and National Arbitration Order, 1940. To understand the question it is necessary, first, briefly to examine certain sections of the Local Government Staffs (War Service) Act, 1939. Sect. 1, sub-s. 1, of the Act provides that where a person employed by and serving certain local authorities specified in the schedule in any of the capacities there specified, ceases so to serve in order to undertake war service, the local authority shall have power to make to or in respect of him certain payments described in sub-ss. 2 and 3. The former sub-section provides that the authority, while such person is engaged in war service, may pay to him, or to cr for the benefit of his wife or dependants, a sum which shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity, after deducting the amount of his war service pay. Sub-s. 3 enables the authority, if such person's death while he is engaged in war service is notified or if he is notified as missing while so engaged, to pay to or for the benefit of his wife or other dependants such sum during a period not exceeding twenty-six weeks as might have been paid to him under sub-s. 2 if he had been so engaged during that period, provided that due regard is to be had to any pension or other sum payable to the wife or other dependant out of public or charitable funds.

It will be convenient, before examining the questions involved, to summarize the material provisions of the order of 1940. This was expressed to be made by the Minister of Labour "with a view to preventing work being interrupted "by trade disputes and by virtue of the powers conferred on "him by reg. 58AA of the Defence (General) Regulations, "1939." The order provided, by art. 2 (1.) and (2.), that, if a trade dispute should exist or be apprehended, the dispute might be reported to the Minister so that he might in the first instance seek to promote a settlement of any trade dispute, but, if he failed, he was to refer the dispute for settlement to the National Arbitration Tribunal which the Minister was required by art. 1 of the order to constitute. Any agreement, decision or award made in virtue of these provisions was to be "binding" on the employers and workers concerned, and it was to be an implied term of the contract between the employers and workmen that the rate of wages to be paid and the conditions of employment under the contract should be in accordance with the agreement, decision or award so made until it was varied by a similar procedure: art. 2 (5.). The definitions contained in art. 7, in Part V., are as follows: "'trade dispute' means any dispute or difference between "employers and workmen, or between workmen and workmen "connected with the employment or non-employment, or "the terms of the employment or with the conditions of "labour of any person . . . . 'Workman' means any person "who has entered into or works under a contract with an "employer, whether the contract be by way of manual labour, "clerical work or otherwise, be expressed or implied, oral or in "writing and whether it be a contract of service or of "apprenticeship or a contract personally to execute any work "or labour." These definitions are identical with, and, in my opinion, have the same meaning as, the definitions contained in the Industrial Courts Act, 1919. The appellants contended that they include the members of the appellant trade union. The respondents disputed this because, they said, the definitions do not include employees of a public or local authority like the respondents, and, in particular, such employees who are engaged in professional, technical or administrative services. In my opinion, the respondents' contention would unduly narrow and limit the wide connotation which should here be given to "trade" and to "workman." Sect. 11 of the Act of 1919 shows that "trade" is used as including "industry" because it refers to a trade dispute in the industry of agriculture. The same inference appears from the short title. It is described as an Act to provide for the establishment of an industrial court in connexion with trade disputes. Trade and industry are thus treated as interchangeable terms. Indeed, "trade" is not only in the etymological or dictionary sense, but in legal usage, a term of the widest scope. It is connected originally with the word "tread" and indicates a way of life or an occupation. In ordinary usage it may mean the occupation of a small shopkeeper equally with that of a commercial magnate. It may also mean a skilled craft. It is true that it is often used in contrast with a profession. A professional worker would not ordinarily be called a tradesman, but the word "trade" is used in the widest application in the appellation "trade unions." Professions have their trade unions. It is also used in the Trade Boards Act to include industrial undertakings. I see no reason to exclude from the operation of the Industrial Courts Act the activities of local authorities, even without taking into account the fact that these authorities now carry on in most cases important industrial undertakings. The order expressly states in its definition section that "'trade "'or industry' includes the performance of its functions by a "public local authority." It is true that these words are used in Part III., which deals with "recognized terms and conditions "of employment," and in Part IV., which deals with "depart-"ures from trade practices" in "any industry or undertaking," and not in Part I., which deals with "national arbitration" and is the part material in this case, but I take them as illustrating what modern conditions involve—the idea that the functions of local authorities may come under the expression "trade or "industry." I think the same may be said of the Industrial Courts Act and of reg. 58AA, in both of which the word "trade" is used in the very wide connotation which it bears in the modern legislation dealing with conditions of employment, particularly in relation to matters of collective bargaining and the like.

I think, therefore, that the appellants are right in their construction of the word "trade" as used in the order. I also think that they are right in their construction of the word "workman," which they contend, as used in the order and in the Industrial Courts Act, includes professional, technical and administrative workers, as well as manual or clerical workers. From another point of view it may be said that every person who seeks to dispose of his services is a trader in that respect. The respondents contended that the phrase "manual labour, clerical work or otherwise" is subject to what is called the ejusdem generis rule, so that what is included is manual labour, clerical work or something analogous to either or both, and that the work of professional, technical and administrative workers is not analogous. This contention also seems to me to be ill-founded. The ejusdem generis rule is often useful or convenient, but it is merely a

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rule of construction, not a rule of law. In the present case it is, in my opinion, entirely inapt. It presupposes a genus, but here the only " genus " is a " contract with an employer." That is what constitutes the person a workman, male or female. In earlier authorities " workman " was used to cover labourers or journeymen. Clerical work was added later, because industrial or labour legislation dealt with clerical workers. That again was found inadequate to cover the whole scope of such legislation. In my opinion, " or otherwise" was intended to embrace the entire range of wage earning or salaried employment. " Workman " means anyone, male or female, who works under a contract with an employer, subject, no doubt, to the general scope of the legislation. For instance, a lady's maid may be an exception. Her contract of employment is, at least prima facie, outside the legislation in question, which is dealing with collective bargaining, trade practices and so forth, and the avoidance of strikes and lock-outs. For the reasons which I have given it also follows that, in my opinion, the order is not ultra vires of reg. 58AA or of the Industrial Courts Act under which it was made.

The respondents, however, contend further that there is here no trade dispute within the definition, because, they say, there is no dispute connected with the terms of employment or the conditions of labour of any person. The examination of this argument involves going back to the Act of 1939 and considering what it enacts. Sect. 1 of the Act gives the respondents a power to disburse money which, apart from the Act, they would not have had. Their normal power is, apart from the Local Government Superannuation Act, 1937, or any other special provision which there may be, to pay remuneration in respect of services. The payments under s. 1 are not for services. They are payments made after employment has ceased. There is a sharp contrast between this power and that under s. 106, sub-s. 1, of the Local Government Act, 1933. The power, however, under s. 1 is not as it stands obligatory. It is a discretion, but at the same time it is also a trust or duty which has to be exercised with due regard to the purposes and policy for which it is given. The respondents have not merely to consider the saving of the ratepayers' money in deciding what to do in regard to this new facultative head of expenditure. Their duty is to give reasonable effect to the national policy, which is to encourage men to engage in war service and to relieve them from pecuniary anxieties if they do so. I do not think it necessary here to consider whether the respondents' action in the matter can be subject to any outside review, even to the extent discussed in *Roberts* v. *Hopwood* (1), which was not in all respects a similar case. The respondents contend that a "trade "dispute" within the meaning of the order cannot be taken to arise by reason of the claim made by the appellants and its rejection by the respondents, otherwise the tribunal would have the power compulsorily to determine for the respondents how they should exercise their discretionary power under s. 1 of the Act of 1939 and to convert by their award what, if granted, would be an act of grace or a gratuity into a contractual right. That, however, is not, in my opinion, a correct way of stating the position. What the appellants claim on behalf of their members who are employees of the respondents is that it should be a condition of their employment that the respondents should exercise in their favour the discretionary power under s. 1 if the occasion should arise. This payment, if made, cannot properly, in my opinion, be regarded as a mere gratuity. Though there is an element of bounty in it, the bounty, if granted, is given for good reasons of national policy. If the employees insist, as a term of their contract, that the respondents should promise to make the payments in the appropriate event and if the respondents should promise to do so, there is a promise on each side—on the part of the respondents to make the payments, on the part of the employees to continue to work. The risk of a strike is avoided. But if the respondents refuse to give the promise, there is then a difference connected with the conditions of employment. I do not see why this does not fall within the definition of a trade dispute in the Act, just as much as a dispute as to the rate of wages or salary, under s. 106, sub-s. 2, of the Local Government Act, 1933. That Act enables a local authority to pay certain officers "such reasonable remuneration as "as they may determine." It is obvious that a dispute as to what the remuneration should be can properly be described as a trade dispute under the order. There is, in my opinion, no real distinction between that case and the present. There was here, I think, a "trade dispute" within the jurisdiction of the tribunal. It is true that the respondents, in consequence of the reference by the Minister of the dispute to

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(1) [1925] A. C. 578.

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the tribunal, may have an award made against them which will be binding on them, but that result follows from the legislation, that is, from the combined effect of the Act of 1939 and the order. The legislation substitutes for free bargaining between the parties a binding award by an impartial tribunal. A further objection to this conclusion was put by MacKinnon L.J. in his judgment in the Court of Appeal (1). I quote from what he said when he was considering an argument that, if the respondents "passed a resolution that they would confer on all their "officers the benefits which they are empowered to give by "s. 1 of the Act of 1939, that would be valid and intra vires." He was of opinion that such a resolution would not be valid. He proceeded: "Even if the corporation, if they thought fit, "could pass such a resolution, I fail to understand how that fact "can be said to make it legal to order them to do so when they "do not think fit . . . . When they say they do not think "fit to do it, I cannot see how an order that takes away their "discretion can be justified by saying they could do it if they "liked." Then he asked (2): "Can the corporation be "legally compelled to submit this dispute to arbitration?" His answer was: "Because such a reference might deprive "them of the discretion which is their legal right, it ought "not to be allowed." His view was that "there is no order "in council in existence which expressly or impliedly cancels "the discretionary power of the corporation under the Act of "1939, and directs that they must exercise those powers whether "they like it or not." With the greatest respect for the learned lord justice, I am unable to agree with the reasoning which he so clearly and forcibly expressed. Exactly the same might be said of a dispute connected with remuneration under s. 106, sub-s. 2, of the Local Government Act, 1933. The employee cannot in general be compelled to work except at wages or on conditions which he demands. The local authority has a discretion whether it will agree to these demands. The result may be a difference which may result in a lock-out or strike and an interruption of work. To avert that risk in the present emergency the powers of the tribunal may be invoked and a binding award made. The freedom in that matter both of the local authority and of the officers is thereby infringed, but such is the effect of the legislation which imposes compulsory arbitration. The Act of 1939 and the order of 1940 must be read together. They dovetail with each other, and produce the result for which the appellant contends. In my opinion, no hypothetical question of illegality, express or implied, arises. It would not be unlawful for the respondents to agree with any one of their officers in advance that in the appropriate event, their powers under the Act of 1939 would be exercised in his favour. I cannot see any good reason why the respondents should not agree in advance to make it a condition of employment with their employees generally that this would be done. Nor can I see why, if the employees insist on that condition and the respondents refuse it, there is not a trade dispute under the order or why the tribunal has not jurisdiction to make a binding award. Somewhat to the same effect as MacKinnon L.J., du Parcq L.J. concluded that the tribunal should be prohibited because, if it entered further upon the reference, either it would reject the claim altogether or it would of necessity make an unlawful award or go beyond its jurisdiction, but as I think that there is here a trade dispute within the terms of the order, the jurisdiction of the tribunal is, in my opinion, established. I need not, therefore, consider whether the apprehensions of the lords justices that the tribunal might make an illegal award could be a sufficient ground to oust the tribunal's statutory jurisdiction. Prohibition is a remedy at least generally intended to prevent an excess of jurisdiction, not the risk of its being erroneously exercised, particularly where considerations of fact may be material. I agree substantially with the views of the Lord Chief Justice and of Tucker J. in the Divisional Court.

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(1) [1941] 2 K. B. 405, 410.

(2) Ibid. 411.

There were some minor objections which I can shortly answer. It would be strangely out of date to hold, as was argued, that a trade union cannot act on behalf of its members in a trade dispute, or that a difference between a trade union acting for its members and their employer cannot be a trade dispute. I may add that the question here is merely whether there should or should not be a prohibition. Any questions of fact which emerge before the tribunal will have to be decided by them. I neither consider nor decide whether every employee of the respondents is a "workman" within the meaning of the order. All that I desire to say here is that "workman" as defined in the order does not, in my opinion, bear the limited meaning for which the respondents have contended. Holding as I do that the jurisdiction of the tribunal in the matter is established, I would allow the appeal and restore the order of the Divisional Court.

LORD PORTER (read by VISCOUNT MAUGHAM). My Lords, the question which your Lordships have to consider is whether a certain dispute which has arisen between the appellants and the respondents can be referred to the arbitrament of the National Arbitration Tribunal. The Minister of Labour has purported to do so under the provisions of reg. 58AA of the Defence (General) Regulations, and of the Conditions of Employment and National Arbitration Order, 1940. That dispute is stated in the reference to be one " arising out of a "claim that it shall be a condition of service of officers in the "employment of the corporation that, in the event of their "serving in His Majesty's forces or in civil defence, they shall "have made up to them the difference between their new pay "and the remuneration which they would have received if "they had remained in the actual service of the corporation."

Is, then, the tribunal entitled to deal with a claim by officers now serving the respondents that when they leave that service to undertake war service or civil defence their remuneration should be so made up during the period in which they are thus engaged? The discussion before your Lordships has ranged over a considerable field but substantially the vital questions may be reduced to four: (1.) Are trade disputes confined to disputes in trade or industry within the ordinary meaning of those terms? (2.) Are persons employed in a technical, administrative or perhaps artistic capacity " workmen " within the statutory definition of that word? (3.) Is the permission, given by s. 1, sub-s. 1, of the Local Government Staffs (War Service) Act, 1939, to make certain payments to an employee ceasing to serve a local authority in order to undertake war services, confined to the giving of a gratuity, or can a contract to make such a payment be legally made? and (4.) Must the decision to make such a payment be made only in respect of each man individually and at or substantially at the time he ceases to serve the authority?

The correct answer to all four questions depends, I think, on the true construction of the various statutes and orders which have already been cited. Of those questions, probably the first and second are the most important, since they concern not only the transient provisions as to war pay, but inevitably must determine the limits of the meaning of the words " trade "dispute" in the Industrial Courts Act, 1919: "inevitably," I say, because by reg. 58AA, para. 4, it is declared that "in this "regulation the expression 'trade dispute' has the same "meaning as in the Industrial Courts Act, 1919," and because the order under which the Minister has purported to refer the present dispute is an order made in reliance on the provisions of that regulation.

I turn, therefore, to the Industrial Courts Act to determine what a "trade dispute" is. The Act is stated in the preamble to be one "to provide for the establishment of an industrial "court and courts of inquiry in connexion with trade disputes." By s. 1, sub-s. 1, a standing industrial court is created "for "the purpose of the settlement of trade disputes." By s. 2, sub-s. 1, "any trade dispute *as defined by this Act*" (the italics are mine) "may be reported to the Minister" who may then "take such steps as seem to him expedient for promoting "a settlement," and by s. 2, sub-s. 3: "The Minister may refer "to the industrial court for advice any matter relating to or "arising out of a trade dispute, or trade disputes in general "or trade disputes of any class . . . ." I quote these out of a number of references to trade disputes in the Act to give some idea of the matters with which the industrial court was created to deal. Ultimately, however, unless it requires limitation by reason of its collocation or the connexion in which it is used, the meaning of "trade dispute" must depend on the definition contained in the Act. That definition is to be found is s. 8 and is declared to be "any dispute or difference "between employers and workmen, or between workmen and "workmen connected with the employment or non-employment, "or the terms of the employment or with the conditions of "labour of any person." So far, the definition is worded in very wide terms which, unless they are narrowed by the meaning given to the word "workmen," would seem to include all employers, all employment and all workmen, whatever the nature or scope of the employment may be. The definition of "workman" is in equally wide terms. It means "any person who has entered into or works under "a contract with an employer whether the contract be by "way of manual labour, clerical work, or otherwise, be "expressed or implied, oral or in writing, and whether it be "a contract of service or of apprenticeship or a contract "personally to execute any work or labour." I can see no limitation on this meaning except that there must be an employer and employee, unless the words "or otherwise" be construed as including only occupations of the same type as manual labour or clerical work, i.e., as if the phrase as a whole meant under a contract by way of manual labour or clerical work or work or labour of the like kind. I am not sure that I know what work or labour would properly be described as of the like kind to manual labour or clerical work, unless the occupations referred to are limited to the activities of the physical worker as opposed to managerial or administrative staff. So to limit them appears to me to be inconsistent with the general scope of the definition, and I find it difficult to extract out of the two words "manual" and "clerical" a class within which the other type of work is to be confined. By s. 10: "This Act is "not to apply to persons in the naval, military, or air services "of the Crown," service which would not normally be classed as giving rise to a trade dispute or included in trade or industry, and the necessity felt for excluding such service, to my mind, accentuates the width of the definition contained in the Act. The inclusion of "industry" also, I think, points in the same direction. It is desired to make the definition comprehensive, and so industry, including by s. 11 the industry of agriculture, is classed with trade.

Art. 7 of the Conditions of Employment and National Arbitration Order, 1940, defines "trade disputes" and "workman" in the same terms as does the Industrial Courts Act and in addition defines "trade or industry" as including "the performance of its functions by a public or local "authority." Both parties seize on this definition to support their case—the appellants maintaining that the performance of these functions means all the functions, while the respondents would exclude the activities of officials and confine them, if the definition applies at all, to workers such as typists, tramway men or refuse removers. But their main contention is that the definition is not of trade or trade dispute but of *trade or industry*, a matter which is within Part III., art. 5, of the order, and comprehends only the obligation to observe terms and conditions recognized in any particular occupation. Indeed, it is pointed out that by para. (3.) of that article a dispute which arises as to the observance or non-observance of recognized terms and conditions is not in itself a trade dispute, but only to be treated as such. The argument appears to me to be unsound. In the first place, I do not think that the distinction is between what is a trade dispute and what is merely to be treated as such. The paragraph says that such a question is to be treated, not as if it were a trade dispute in general, but "as if it were a trade dispute *reported to the Minister* "*under the provisions of art. 2 of this Order.*" In other words, it is not to be dealt with as if it were a trade dispute, which I think in fact it is, but as if it were a particular kind of trade dispute, i.e., a dispute under art. 2, as to which it is said that "the provisions of that article shall apply accordingly." Moreover, I think a definition of "trade or industry" as including the performance of its functions by an authority must mean that the word "trade" alone includes that performance and so also does the word "industry" alone, so that whether the word "trade" be used or "industry" or both, the functions of a public or local authority are comprehended. The disjunctive "or" could hardly be used to unite two words in a phrase if that phrase required both if the definition was to apply. For these reasons I think that neither "trade disputes" as used in the order or in the Act of 1919 are confined to trade in the narrower sense, nor does the word "workman" exclude all save the manual or clerical staff. On the contrary, I think it includes those engaged in managerial and administrative duties.

If, then, the appellants come within the mischief of the order, it remains to be determined whether the giving or withholding of such sum as will make up the pay of those who cease to serve the respondents in order to undertake war service is a matter to be decided solely at the discretion of the authority or whether it can be referred to the National Arbitration Tribunal. Is it or can it be made the subject of a contractual right, and can it be effected by means of a general resolution, or must each case be determined individually and only in respect of each employee at or approximately at the time when he ceases to serve the authority? The answer depends on the meaning of the provisions of s. 1 of the Local Government Staffs (War Service) Act, 1939. The relevant words may be stated with sufficient accuracy as follows: (1.) Where a person serving as employee of a local authority in a civil capacity ceases so to serve in order to undertake war service, the authority shall have power to make in respect of him (inter alia) the payments set out in (2.) immediately below. (2.) While any such person is engaged in war service the authority may pay in respect of him a sum which shall not exceed the remuneration which he would have received if he had continued to serve in his civil capacity after deducting therefrom the amount of his war service pay. It is notable that the section says nothing as to the time at which the authority shall have power to determine whether it will make the payments or not. The payments may only be made while the employee is engaged in war service, but the promise of them may be made at any time. Apart from the Act of 1939, the only power possessed by a local authority to pay its employees is that contained in s. 106, sub-s. 2, of the Local Government Act, 1933: "may pay . . . . such "reasonable remuneration as they may determine." The effect of the Act of 1939 is to give power to make up to the extent indicated the pay of those who give up their service with the authority for war service so long as they are so engaged, a power which they would not have had and the exercise of which would have been ultra vires had it not been for this section. Any sum found for this purpose, the respondents say, is not remuneration because the recipients only get it when they have ceased to be employed. It is a gratuity which the authority may or may not give at their pleasure and can at any moment withdraw. In no case has the man engaged on war service any legal right to it. If, then, it can only be given as a gratuity it cannot be referred to the National Arbitration Tribunal. To do so would be to give a legal right to demand it, since under the Conditions of Employment and National Arbitration Order, 1940, art. 2 (5.): "Any award made by virtue of the . . . . provisions of this "article shall be binding upon the employers and workers to "whom the award relates, and as from the date of such award "or as from such date as may be specified therein . . . . it "shall be an implied term of the contract between the "employers and workers to whom the award relates that the "rates of wages to be paid and the conditions of employment "to be observed under the contract shall be in accordance "with such award until varied by a subsequent agreement "decision or award." If it cannot be given except as a gratuity I think this argument is sound: see *Holloway* v. *Poplar Corporation* (1). I cannot see how what can only be a gift can be turned into a legal right because machinery is provided whereby the rate of wages to be paid or the conditions of employment to be observed may be referred to

(1) [1940] 1 K. B. 173.

an arbitral tribunal. As a gratuity it is neither wages nor conditions of employment. Is it a gratuity, then, and nothing else? I think not. I see no reason why the respondents should not at any time resolve as part of the terms of employment of their servants that each of those servants should receive such a sum as would make up his pay to the remuneration he would have received if he had continued to serve in his civil capacity. Nor do I see why before the service with the authority ceases a contract should not be made containing a promise to pay a wife or other dependants the sums permitted by s. 1, sub-s. 3, though such a contract would, I think, have to contain a proviso that in making payment regard should be had to any pension or other sum payable to or for the benefit of the wife or other dependants out of public or charitable funds. A public body may make provision for the payment to the employees of a pension after they have ceased to serve it. They could not, it is true, do so unless an Act of Parliament gave them power. In the same way they would have no power to make up their employees' pay while engaged on war service were it not for the Act of 1939. In each case the employee has "ceased to serve," before the period for which payment can be made begins. In each case, the remuneration might be "unreasonable" under the Act of 1933, but it has been rendered permissible—a kind of statutory reasonableness—by Act of Parliament. The effect of the Act is to put the public body in the same position as a private individual, subject, of course, to the limitations imposed by the Act itself. The individual can pay what he likes. The authority can only make up the pay to what it would have been if the individual concerned remained in their service. The further provisions of the Act as to superannuation contained in ss. 3, 4 and 5 of the Act in no way affect this conclusion. They merely provide machinery for a continuance of certain advantages to the employee if he wishes to keep them during a period in which he has ceased to be in the employment of the authority. The Act, no doubt, contemplates that the employee should return to the service of the authority when the war is over and its object appears to be the preservation of his standard of life in the meantime. Indeed, some indication that a return to service is contemplated is to be found in ss. 4 and 5, the former of which provides for the continued payment of contributions for superannuation purposes in spite of the cessation of civil service, and the latter that if a claim is made for a return of contributions the period of war service shall no longer be calculated as civil service for superannuation purposes, but does not even then terminate the power to make up pay. If the Act intended that any sums paid to employees serving as soldiers should be gratuitous and should not be received as of right, I can see no difficulty in making the intention plain. Indeed, the Local Government Superannuation Act, 1937, which the respondents' advocates claimed to be analogous to the Act of 1939, speaks in plain terms in s. 11 of gratuity where gratuity is meant.

I conclude that the local authority is given power to make the payments under consideration, and that the question whether they shall be made at all, and if at all how much should be given, is a matter referable to the National Arbitration Tribunal unless the respondents are right in maintaining that the promise of payment can only be made to each man severally and on consideration of his individual circumstances. Once it is recognized that the payment is not necessarily a gratuity, I see no ground for this contention. It is true that in the case of a grant to a wife or dependant consequent on the death of the employee regard must, in accordance with the terms of the proviso to s. 1, sub-s. 3, be had to the pension or other sum (if any) there stipulated. Even that consideration could, I doubt not, be dealt with by general resolution, but in the case of the man himself there is even less difficulty. I see no reason for supposing that the authority must necessarily consider his individual circumstances either when he ceases to be employed or at any earlier or later time. They may do so, of course, but, in my opinion, they are no more obliged to do so than they are under an obligation to lower or enhance his regular pay in accordance with his circumstances, or to consider whether he is furnished with a reasonable competence apart from his salary or totally dependent on it, or, again, whether he is a married man with a large family or still single. The authority are entitled to treat all their employees in the same grade on the same basis, and so also, as I think, to make up the pay of each man on the like basis.

The respondents are undoubtedly entitled to make up the pay of a medical officer of health and sanitary inspector (see s. 2, sub-s. 1, of the Local Government Staffs (War Service) Act, 1939), and if they do not do so in their case or in the case of their other officers I think a trade dispute may arise. Further, as I have indicated, I think that that dispute can be referred to and is cognizable by the National Arbitration Tribunal, though what that tribunal may determine is, of course, a matter for it and it alone. I would, accordingly, allow the appeal.

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1942
NATIONAL ASSOCIATION OF LOCAL GOVERNMENT OFFICERS
v.
BOLTON CORPORATION.

Solicitors for appellants: *J. M. McDonnell, Jackson & Co.*

Solicitors for respondents: *C. E. C. Browne, for Philip S. Rennison, Town Clerk, Bolton.*

Solicitor for the Minister: *Solicitor, Ministry of Labour and National Service.*

[HOUSE OF LORDS.]

BRITISH FAME (OWNERS) . . . . . APPELLANTS;

AND

MACGREGOR (OWNERS) . . . . . RESPONDENTS.

H. L. (E.)*
1942
Nov. 16.

THE MACGREGOR.

Shipping—Collision—Apportionment of blame—Revision by appellate tribunal.

When an appellate tribunal accepts the findings of fact of the court below and its conclusion that two vessels in collision were both to blame, it should, in the absence of error in law, only revise the distribution of blame in very exceptional cases, as where, for instance, a number of different reasons have been given why one ship is to blame, but the appellate court, on examination, find some of those reasons not to be valid, or where the judge in distributing blame is shown to have misapprehended a vital fact bearing on the matter.

Dicta of Lord Wright in *The Umtali* (1938) 160 L. T. 114, 117; of Lord Buckmaster in *Kitano Maru* (*Owners*) v. *Otranto* (*Owners*) [1931] A. C. 194, 204; and of Lord Sterndale M.R., Warrington L.J., and Scrutton L.J., in *The Karamea* [1921] P. 76, 78, 83, 89, approved and applied. Statement of principle in *The Testbank* [1942] P. 75 not approved.

Decision of the Court of Appeal reversed.

APPEAL from the Court of Appeal.

On March 5, 1940, the motorship, *British Fame*, owned by

**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD WRIGHT, and LORD PORTER.

the appellants, and the steamship, *Macgregor*, owned by the respondents, were sailing in a convoy composed of several columns, the *Macgregor* being the leading ship in the first column from the port side and the *British Fame* the second ship in the second column. They came into collision near the line of the third column, after the *Macgregor* had starboarded for a ship crossing the convoy from starboard to port. The appellants brought an action of damage by collision against the respondents, who counterclaimed. Bucknill J. held that the *Macgregor* was to blame for coming across into her wrong water, and that the *British Fame* was also to blame in respect of her speed and in putting herself too close to the third column. He apportioned the blame two-thirds to the *Macgregor* and one-third to the *British Fame*. The Court of Appeal, while maintaining the view that both vessels were to blame, varied the distribution of the blame by attributing two-thirds to the *British Fame* and one-third to the *Macgregor*. The appellants appealed to the House of Lords. There was no cross-appeal.

Hayward K.C. and *Owen Bateson* for the appellants.
Noad K.C. and *E. W. Brightman* for the respondents.

Viscount Simon L.C. My Lords, this is an appeal brought by the owners of the motorship, *British Fame*, against a decision of the Court of Appeal which varied the proportions in which blame is to be shared in respect of a collision between the *British Fame* and a steamship called the *Macgregor*, for which Bucknill J. at the trial found both to blame. There is no cross-appeal, and we must proceed on the basis that it cannot be disputed that the collision between the *Macgregor* and the *British Fame* was one for which both ships were to blame. The only question that remains for debate is the question of the distribution of that blame. Speaking for myself, I think that the conclusion at which Bucknill J. arrived on that question was a perfectly reasonable one, having regard to the facts which he found. The Court of Appeal, however, has thought it right, while maintaining the view that both ships were to blame, to vary the distribution of the blame by putting two-thirds of it on the *British Fame* and relieving the *Macgregor* so that the *Macgregor* has to carry only the remaining one-third.

It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate court, while accepting the findings of fact of the court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial judge. I do not say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but the Court of Appeal, on examination, found some of those reasons not to be valid, that might have the effect of altering the distribution of the burden. If the trial judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal. But, subject to rare exceptions, I submit to the House that, when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare.

I remind your Lordships of the language used by my noble and learned friend, Lord Wright, in *The Umtali* (1). In his speech in that case, with which the other noble and learned Lords agreed, Lord Wright said: "It would require a very "strong and exceptional case to induce an appellate court to "vary the apportionment of the different degrees of blame "which the judge has made, when the appellate court accepts "the findings of the judge." It appears to me, my Lords, that that passage directly applies here. I do not find in the judgments of the Court of Appeal or in the arguments which have been addressed to us by the respondents sufficient ground for interfering with the apportionment decided on by Bucknill J. That apportionment, in my judgment, should stand, and I move that this appeal be allowed with costs.

Lord Atkin. My Lords, I agree entirely with the opinion which has just been expressed by the Lord Chancellor, and in those circumstances, although we are differing from the judgment of the Court of Appeal, I find it unnecessary to add any reasons of my own.

Lord Thankerton. My Lords, I concur.

Lord Wright. My Lords, I also concur, but I ought to add a few words on *The Testbank* (2), in which the Court of

(1) (1938) 160 L. T. 114, 117.

(2) [1942] P. 75.

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Lord Wright.

Appeal varied the apportionment of degrees of blame as between two vessels actually found to be in fault. In the headnote to that case it is stated: "The finding of the trial "judge as to the degrees of blame to be attributed to two or "more ships which are in fault . . . . is a conclusion of fact, "and as such"—these are the important words in the headnote which seem to me to be borne out by the judgment—"is open "to review by the Court of Appeal no more and no less than "any other finding of fact by the trial judge." With the greatest respect to the Court of Appeal, and without in any way expressing any opinion on the actual decision at which they there arrived, I venture to think that their statement of principle is not quite in accord with the authorities, so far as laid down up to the present. *The Umtali* (1), which was a decision of this House, was not cited to the Court of Appeal, but there was cited *The Karamea* (2) in which Lord Sterndale M.R., a great authority on these matters, dealing with this question of apportionment, said (3): "I think it would need "a very strong case indeed to induce this court to interfere "with [the judge's] discretion as to the proportions of blame. "We have power to do it, but I do not suppose that we should "ever think of doing it." Warrington L.J. is reported as saying (4): "It may well be and probably is the case that if "the court arrives at the same conclusion both on the facts "and in law it would not interfere merely because the learned "judge in his discretion has given proportions which this "court thinks it would not have given." Scrutton L.J. said (5): "If the Court of Appeal agrees with the findings of "fact and law of the learned judge below, and the only "difference is that it attaches more importance to a particular "fact than he did, it would require an extremely strong case "to alter the proportions of blame which the learned judge "below has attributed to the ships."

It seems to me that these observations of three very eminent judges are quite in accord with what was said in *The Umtali* (1) and with what the Lord Chancellor has just said. I do not say, any more than they did, that under proper conditions, such as those indicated by the three members of the Court of Appeal in *The Karamea* (2), the judge's apportionment might not be interfered with by an appellate court, but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment. The accepted rule was clearly stated by Lord Buckmaster, with the assent of the other Lords, in *Kitano Maru* (*Owners*) *v. Otranto* (*Owners*) (*The Otranto*) (1), in these words: "Upon "the question of altering the share of responsibility each has to "take, this is primarily a matter for the judge at the trial, and "unless there is some error in law or in fact in his judgment it "ought not to be disturbed." I might add that in *The Karamea* (2) the Court of Appeal varied the proportion of liability because they took a different view of the facts. Their decision was affirmed by this House: *Haugland* (*Owners*) v. *Karamea* (*Owners*) (3).

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(1) (1938) 160 L. T. 114, 117.
(2) [1921] P. 76.
(3) Ibid. 78.
(4) Ibid. 83.
(5) Ibid. 89.

LORD PORTER. My Lords, I also agree that this appeal should be allowed, and I agree with the reasons given by the noble Lord on the woolsack and also with the grounds and reasoning of my noble and learned friend, Lord Wright. I have only to say that, speaking for myself, if I had to choose between the reasoning of the judgments in *The Karamea* (2) and that of those in *The Testbank* (4), as at present advised I should prefer that in *The Karamea* (2).

The principles which govern an appellate court in determining whether to vary the apportionment of blame in an Admiralty case have been laid down in a number of decisions and consistently followed both in this House and in the Court of Appeal at any rate since 1915. In that year in *The Peter Benoit* (5), (affirmed without discussion on this point (6)) the

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(1) [1931] A. C. 194, 204.
(2) [1921] P. 76.
(3) [1922] 1 A. C. 68
(4) [1942] P. 75.
(5) (1915) 84 L. J. (P.) 87.
(6) (1915) 85 L. J. (P.) 12.

Court of Appeal thought that the trial judge had misinterpreted a rule of navigation and therefore varied the proportion of blame, but Pickford L.J. in the course of his judgment said (1): "I think this court ought not lightly to interfere with the "judgment of the court below on a question of apportioning "liability, and certainly should not do so if this court accepted "all the facts found by the learned judge, or all the elements of "his decision upon which he based his proportions." Bankes L.J. took a similar view. *The Karamea* (2) has already been referred to. Its principles were followed in *The Clara Camus* (3), where Scrutton L.J. adopted language almost identical with that which he used in the former case, and his words were repeated and approved by Lord Shaw on an appeal to your Lordships' House (4). The words of Lord Buckmaster in *The Otranto* (5), already quoted by Lord Wright are to the like effect.

My Lords, I venture to add these observations to those of the Lord Chancellor and of my noble and learned friend, Lord Wright, because whatever may be the true view as to the decision in *The Testbank* (6), of which I say nothing, the principle applicable to the review of apportionment of blame is, as I think, too widely stated in that case having regard to the series of decisions which preceded it. Except *The Karamea* (2) those decisions do not appear to have been quoted to the Court of Appeal, and consequently I have thought it desirable to repeat the opinions which they express.

Appeal allowed.

Solicitors for appellants: *William A. Crump & Son.*

Solicitors for respondents: *Thomas Cooper & Co., for Gilbert Robertson & Co., Cardiff Docks.*

(1) (1915) 84 L. J. (P.) 87, 90.
(2) [1921] P. 76.
(3) (1925) 134 L. T. 50, 55.
(4) (1926) 136 L. T. 291, 293.
(5) [1931] A. C. 194, 204.
(6) [1942] P. 75.

[HOUSE OF LORDS.]

SOVFRACHT (V/O)	APPELLANTS ;	H. L. (E.)*
AND		1942
VAN UDENS SCHEEPVAART EN AGENTUUR MAATSCHAPPIJ (N.V. GEBR.)	RESPONDENTS.	*July* 24, 27, 28, 29, 30 ; *Dec.* 3.

Alien—Enemy—Company incorporated in allied State occupied by enemy — Right to take proceedings in English courts — Effect of occupation of allied State—Solicitor—Retainer — Termination — Client acquiring enemy status.

Before the outbreak of war between Great Britain and Germany in September, 1939, the respondents, a shipowning company incorporated under the law of the Netherlands and having their principal place of business in Rotterdam, chartered one of their vessels to the appellants. Disputes having arisen between them, the respondents sought arbitration in London in accordance with a provision in the charterparty, and in April, 1940, each party appointed an arbitrator. In May, 1940, the Germans invaded the Netherlands and brought the country entirely under their control. The appellants refused to proceed with the arbitration :—

Held, that the respondents, being resident in the Netherlands, were in the position of alien enemies at common law and had ceased to enjoy the right of resort to the King's courts save by permission given by royal licence.

Invasion of territory, resulting in the enemy being in effective control, at the material time, and exercising some kind of government or administration over it, as distinct from occupation of a slighter character merely for military purposes, gives the area an enemy character and disqualifies local residents from suing in the King's courts.

Cremidi v. *Powell* (*The Gerasimo*) (1857) 11 Moo. P. C. 88, criticized.

Per Lord Porter. The authority of the respondents' solicitors to continue to represent them terminated when the respondents themselves became technical enemies.

Decision of Court of Appeal (sub nom. *N.V. Gebr. Van Udens Scheepvaart en Agentuur Maatschappij* v. *Sovfracht*) [1942] 1 K. B. 222, reversed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C., LORD WRIGHT, and LORD PORTER, were as follows : The respondents were a shipowning company incorporated under the law of the Kingdom of the Netherlands with their principal place of business at Rotterdam. By a charterparty dated August 11, 1939, they chartered one of their vessels, the *Waalhaven*, to the appellants who were a Russian company. Disputes arose between the parties and the respondents sought arbitration under a clause in the charterparty which provided for arbitration in London. In April, 1940, the respondents and the appellants appointed their arbitrators, but on May 10, before the matter could proceed further, Germany, which had been at war with Great Britain since September, 1939, invaded the Netherlands and in a short time the whole country, including Rotterdam, was completely occupied by the enemy and under enemy control. The Royal Netherlands government retired to England. All the respondents' vessels save one were brought beyond enemy control, but there was no evidence that the respondents had either altered the place of their activities or had ceased to carry on business, nor of the whereabouts of their directors. There was no evidence of the constitution of the respondent company, the character of its membership, its regulations, or the exact nature of its business. On May 20, the solicitors who had been acting for the respondents in the arbitration applied to the Custodian of Enemy Property for his "formal approval to the arbitration "being proceeded with in the normal course" on the understanding that any sums recovered from the appellants would be accounted for to him "in accordance with the Trading with "the Enemy Regulations." On May 22, the Custodian replied: "There will be no objection so far as the Trading "with the Enemy legislation is concerned to your proceeding "with the arbitration . . . ." On September 24 and October 4, the appellants' arbitrator and their solicitors refused to proceed with the arbitration, the arbitrator subsequently stating, in a letter dated April 21, 1941, that when the respondents "became "enemy aliens the retainer to their solicitors was terminated." On June 24, 1941, the respondents took out a summons asking for the appointment of an umpire. Master Ball, after hearing argument from both sides, made the order which was confirmed by the judge in chambers, Asquith J., who gave the appellants leave to appeal to the Court of Appeal. The hearing before the Court of Appeal (Lord Greene M.R., Goddard and du Parcq L.JJ.) began on October 13, 1941. It was not contended that the Custodian's letter had any legal validity as

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**Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD WRIGHT, and LORD PORTER.

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a licence to the respondents or their solicitors to proceed, but, while the case was being argued, an adjournment was granted to enable an application to be made to the Trading with the Enemy Branch (Treasury and Board of Trade) which gave an authority, dated October 15, 1941, to the solicitors purporting to act for the respondents "to continue to represent and act "on behalf of" them. The authority, which was given under the Trading with the Enemy Act, 1939, s. 1, sub-s. 2 (i.), further stated: "This authority will operate retrospectively "to cover your actions since May 22, 1940. It is for the "court or the arbitrator to decide whether the [respondents], "being in enemy-occupied territory, are entitled to proceed "with the dispute in the circumstances." On November 5, 1941, the Court of Appeal dismissed the appeal and held that the respondents were not in the position of enemy aliens at common law and thus still enjoyed the right of resort to the King's courts. It held, however, that they were an "enemy" corporation for the purposes of the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940 (1), and, accordingly, that it was illegal for the solicitors to act for them in this country without a licence. It was further held that, although the authority given to them could not operate retrospectively to legalize acts which at the time they were done were unlawful as being in breach of the Act and the regulations, the difficulty was overcome by the concession on the part of the appellants' counsel that all the proceedings should be deemed to have taken place before October 13, 1941. The appellants appealed to the House of Lords.

Pritt K.C. and *Gerald Gardiner* for the appellants. The respondents are enemy aliens at common law and are, therefore, debarred from taking proceedings before the English courts. It would be contrary to the established principles of the common law that traders carrying on, in territory occupied and controlled by the enemy, a business of assistance to the enemy and detrimental to this country, should be allowed to take such proceedings. The answer to the question: Who is an alien enemy? rests on public policy. When territory is effectively in the occupation of the enemy the requirements of public policy must prevail, wherever the abstract sovereignty of that territory may lie. In the case of a company, its commercial domicil determines whether it is to be classed as an enemy alien. Nationality and allegiance are not material, save as regards the temporary allegiance, if any, depending on the place where a person happens to be. There can be no distinction for present purposes between German territory proper and territory effectively occupied by the Germans. *The Hoop* (1), which turned on facts similar to those of the present case, is an authority for prohibiting trade with citizens of a country which, although not at war with England, is in hostile occupation. The reasoning in *Porter* v. *Freudenberg* (2) covers this case. [They referred to *M'Connell* v. *Hector* (3); Procedural Capacity of Alien Enemies, by Professor McNair, Law Quarterly Review, (1942) vol. lviii., pp. 191, 201, n. 48; *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ld.* (4); *In re Deutsche Bank* (*London Agency*) (5); *Donaldson* v. *Thompson* (6); *Hagedorn* v. *Bell* (7); *Tingley* v. *Müller* (8); *Bentzon* v. *Boyle* (*Thirty Hogsheads of Sugar*) (9); and *United States* v. *Rice* (10).] Further, the retainer of the solicitors was dissolved or suspended as soon as the respondents became alien enemies. A retainer is a contract of agency, and in this case it has lapsed and nothing has revived it. Accordingly, the solicitors have no authority to act: see *Robson* v. *Premier Oil and Pipe Line Co., Ld.* (11).

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(1) By s. 2, sub-s. 1, of the Trading with the Enemy Act, 1939, as amended by reg. 3 of the Defence (Trading with the Enemy) Regulations, 1940 (St. R. & O., 1940, No. 1092): ". . . . the expression 'enemy' for "the purposes of this Act means ". . . . (*e*) as respects any business "carried on in enemy territory, "any individual or body of "persons (whether corporate or "unincorporate) carrying on "that business." By s. 15, sub-s. 1, of the Act: ". . . . 'enemy "'territory' means any area "which is under the sovereignty "of, or in the occupation of, a "power with whom His Majesty "is at war."

Sir Robert Aske K.C. and *A. J. Hodgson* for the respondents. The respondents are not in the position of enemies since they do not fall within any of the following classes: (1.) enemy nationals resident in their own country; (2.) enemy nationals in other countries engaged in acts hostile to England; (3.) neutrals or allies voluntarily residing or carrying on business

(1) (1799) 1 C. Rob. 196.
(2) [1915] 1 K. B. 857.
(3) (1802) 3 Bos. & P. 113.
(4) [1915] 2 Ch. 409.
(5) [1921] 2 Ch. 291.
(6) (1808) 1 Camp. 429.
(7) (1813) 1 M. & S. 450.
(8) [1917] 2 Ch. 144.
(9) (1815) 9 Cranch, 190.
(10) (1819) 4 Wheat. 246.
(11) [1915] 2 Ch. 124.

in the enemy's country; (4.) British subjects voluntarily resident or carrying on business in the enemy's country and thereby subjecting themselves to his rule and giving him allegiance. Enemy character does not extend beyond these classes so far as regards persons, although the property of neutrals or allies may be subject to seizure and confiscation in other countries. Thus, when a neutral has a house of trade in an enemy's country, he does not himself become an enemy but his assets there are liable to confiscation. The grand test of enemy character to determine the right to sue is allegiance, permanent or temporary, to the King's enemies: *The Hoop* (1); *O'Mealey* v. *Wilson* (2); *M'Connell* v. *Hector* (3). The relevant considerations are not altogether the same as those relating to questions of trading with the enemy. The authorities confine the definition of enemy aliens to the subject of allegiance to the enemy sovereign. To turn a neutral into an enemy it must be shown that he owes allegiance to a state at war with this country. Territory which is merely occupied by the enemy is not enemy territory, for the inhabitants of an invaded country owe no duty to the invader. The rule debarring enemy aliens from suing in the King's courts is based on the idea that they are adhering to the King's enemies, and inhabitants of occupied territory do not fall within that rule. There is no such thing as temporary allegiance to an invader. The inhabitants of the invaded country owe allegiance to the same sovereign as before the invasion. To alter the position there must be a formal annexation of the invaded country or its incorporation into the territory of the invading power: *Cremidi* v. *Powell* (*The Gerasimo*) (4). There is nothing to establish that the inhabitants of the Netherlands are enemies of England. They neither owe nor profess allegiance to Germany. They are merely the subject of overpowering force: *Sparenburgh* v. *Bannatyne* (5). Their courts continue to function, and this can only be under the authority of the Queen. So, too, with the civil administration and business life. The appellants' proposition involves the conclusion that, if a State is invaded and occupied and England goes to war to protect it, all its inhabitants become enemies and their property is liable to confiscation. The rule that enemy aliens cannot sue in the

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(1) 1 C. Rob. 196.
(2) (1808) 1 Camp. 482.
(3) 3 Bos. & P. 113.
(4) (1857) 11 Moo. P. C. 88, 96.
(5) (1797) 1 Bos. & P. 163.

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King's courts is based on public policy, and it is contrary to public policy that subjects of an allied state should be liable to have their goods confiscated for that would jeopardize the alliance. It is not an inflexible principle that enemy aliens cannot in any circumstances be plaintiffs: *Rodriguez* v. *Speyer Brothers* (1). In *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ld.* (2), a Polish company was plaintiff. [Viscount Simon L.C. In that case the House had expected the plaintiffs to obtain the licence of the Crown. Instead, they obtained the licence of the Board of Trade. I doubt whether that was regular. The House treated it as sufficient, but it must not be taken that the House has laid it down that a company domiciled in territory occupied by the enemy can litigate to its heart's content provided it obtains the consent of the Board of Trade.] The right to sue is not the same as the right to receive the proceeds of the action, and there is no chance of the proceeds of this action going into enemy hands since there is an undertaking to pay them to the Custodian of Enemy Property. Money and goods can always be prevented from reaching territory occupied by the enemy. Even if the respondents are now enemy aliens the authority of the solicitors to act for them in this matter continues: *Tingley* v. *Müller* (3). [They referred to *The Anglo-Mexican* (4); *De Jager* v. *Attorney-General of Natal* (5); *Janson* v. *Driefontein Consolidated Mines, Ld.* (6); *Schaffenius* v. *Goldberg* (7); *The Gutenfels* (8); *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co. (Great Britain), Ld.* (9); *Casseres* v. *Bell* (10); Oppenheim on International Law, 5th ed., vol. ii., pp. 349 et seq., paras. 169, 170; Stroud's Judicial Dictionary, 2nd ed., vol. i., p. 70.]

Pritt K.C., in reply, referred to *The Manilla* (11), where *The Dart* (12) and *The Happy Couple* (12) are noted.

[Viscount Simon L.C. referred to *Schmitz* v. *Van der Veen & Co.* (13) and *Weiner* v. *Central Fund for German Jewry* (14).]

The House took time for consideration.

(1) [1919] A. C. 59.
(2) [1942] A. C. 33.
(3) [1917] 2 Ch. 144.
(4) [1918] A. C. 422.
(5) [1907] A. C. 326.
(6) [1902] A. C. 484.
(7) [1916] 1 K. B. 284.
(8) [1916] 2 A. C. 112.
(9) [1916] 2 A. C. 307.
(10) (1799) 8 Term Rep. 166.
(11) (1808) Edwards 1.
(12) (1808) Unrep.
(13) (1915) 84 L. J. (K. B.) 861.
(14) [1941] 2 All E. R. 29.

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1942. Dec. 3. VISCOUNT SIMON L.C. My Lords, the principal question to be decided in the present appeal is whether the Court of Appeal was right in holding that the respondents were not in the position of alien enemies at common law and thus still enjoy the right to resort to the King's courts. A subsidiary question as to the validity of the retainer of the solicitors for the respondents becomes irrelevant if the appeal on the main point were to succeed.

On the main question, it is, of course, common ground that an "alien enemy" cannot sue in the King's courts or otherwise take up the position of an actor in British litigation save under royal licence. An alien enemy, in this connexion, does not mean a subject of a state at war with this country, but a person, of whatever nationality, who is carrying on business in, or is voluntarily resident in, the enemy's country: *Porter* v. *Freudenberg* (1). That case was the decision of a specially constituted Court of Appeal at the beginning of the last war. It confirmed the view which was taken by our courts during the Napoleonic wars, e.g., in the King's Bench in *O'Mealey* v. *Wilson* (2), where Lord Ellenborough C.J. said: "If a "British subject resides in an enemy's country without being "detained as a prisoner of war, he is precluded from suing "here," and by the Court of Common Pleas in *M'Connell* v. *Hector* (3) when the court declined to support a commission of bankruptcy granted at the suit of three partners, all British subjects, on the ground that two of them resided and traded at an enemy port. (The port was the Dutch port of Flushing, described (4) as "a port belonging to the enemies of this "country." As Professor McNair points out in a learned article on the "Procedural Capacity of Alien Enemies" in the Law Quarterly Review (1942), vol. lviii., p. 191, at p. 201, n. 48: "The relevant date is not given but was probably "during the period when Holland under a Franco-phile "puppet government was at war with Great Britain.") In that case Lord Alvanley C.J. said: "I do not wish to hear it "argued that a person who lives and carries on trade under "the protection and for the benefit of an hostile state, and "who is so far a merchant settled in that state that his goods "would be liable to confiscation in a court of prize, is yet to "be considered as entitled to sue as an English subject in an "English court of justice." This decision was approved by this

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(1) [1915] 1 K. B. 857, 869.
(2) 1 Camp. 482, 483.
(3) 3 Bos. & P. 113, 114.
(4) Ibid. 113.

House in *Rodriguez* v. *Speyer Brothers* (1), when Lord Finlay L.C. said of it: "All that was decided by the court was that "enemy character results from residence in the enemy "country, and there is no doubt as to the correctness of this "proposition."

There can be no doubt that the respondent company must be treated as "resident" in Rotterdam. Their commercial domicil was there, and there is no indication that it has changed. The case must be dealt with as though they were an individual subject of the Queen of Holland living there. I share to the full the feeling of distaste, expressed by the Master of the Rolls, at the idea that loyal Dutch subjects, who have suffered so cruelly at the hands of a brutal enemy and whose fellow countrymen are none the less maintaining from this country all the resistance they can to the invaders of their native land, should be regarded by English law, for any purpose, as alien enemies, but for the purposes of the statute law prohibiting trading with the enemy they would plainly be so regarded, for "enemy territory" is defined, by s. 15, sub-s. 1, of the Trading with the Enemy Act, 1939, so as to include "any area which "is . . . . in the occupation of a Power with whom His Majesty "is at war." Here, however, we are concerned with the common law. Even a British subject, if voluntarily resident in enemy territory, would be treated at common law as unable to sue: see, for example, Lord Parker's speech in *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ld.* (2), for the denial of persona standi in judicio does not turn on allegiance, but on locality. The question is, therefore, simply whether residence in territory which has been invaded and is forcibly occupied by the enemy disqualifies (apart from royal licence) from bringing or pursuing a suit in the King's courts.

I have had the advantage of perusing the opinions prepared by my noble and learned friends Lord Wright and Lord Porter, in which most of the relevant earlier decisions, both in this country and in the United States, are collected and analytically examined, and this relieves me from lengthening my own opinion by attempting any elaborate citation of authorities. To the cases cited by my noble and learned friends, I will add a reference to a Scottish decision given during the last war: *Gebruder Van Uden* v. *Burrell* (3). There the Court of Session (Lord President Strathclyde, Lord

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(1) [1919] A. C. 59, 73.
(2) [1916] 2 A. C. 307, 339.
(3) 1916 S. C. 391.

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Skerrington and Lord Anderson) held that a Dutch firm (I do not know whether the firm was the precursor of the respondent company, but the name is the same and it was a firm of steamship owners in Rotterdam), which was an enemy within the meaning of the Trading with the Enemy Act, 1914, because the partners also carried on business in Germany, could be defeated as pursuers by the plea of alien enemy.

My own conclusions, deduced from the authorities, are in general accord with those of Lord Wright and Lord Porter and may be summarized as follows :—

1. The test of "enemy character" is fundamentally the same whether the question arises over a claim to sue in our courts, or over issues raised in a court of prize, or over a charge of trading with the enemy at common law.

2. The test is an objective test, turning on the relation of the enemy Power to the territory where the individual voluntarily resides or the company is commercially domiciled or controlled. It is not a question of nationality or of patriotic sentiment.

3. If the enemy Power invades and forcibly occupies territory outside his own boundaries, residence in that territory may disqualify from bringing or maintaining suit in the King's courts in the like manner as residence in the enemy Power's own territory would. The same applies to a company commercially domiciled or controlled in occupied territory.

4. But this is not always or absolutely so. It depends on the nature of the occupation and on the facts of each case. If, as a result of the occupation, the enemy is provisionally in effective control of an area at the material time and is exercising some kind of government or administration over it, the area acquires "enemy character." Local residents cannot sue in our courts and goods shipped from such an area have enemy origin : see Marshall C.J. in the *Thirty Hogsheads of Sugar. Bentzon* v. *Boyle* (1). If, on the other hand, the occupation is of a slighter character—for instance, if it is incidental to military operations and does not result in effective control—the case is different, as in *Cremidi* v. *Powell* (*The Gerasimo*) (2). I would adopt the observations of my noble and learned friend Lord Wright on this decision, for I agree that, while Dr. Lushington's statement of the law went too far in one direction, Lord Kingsdown (then the Right Hon. Thomas Pemberton Leigh) in delivering the judgment of the

(1) 9 Cranch, 191, 195.

(2) 11 Moo. P. C. 88.

Privy Council reversing the decision of the Prize Court, in one passage went unnecessarily far in the other. In the present case, the occupation of Holland by Germany is plainly, as things stand, of the more absolute kind.

5. It is not irrelevant to bear in mind the reason why a resident in enemy-occupied territory is in certain circumstances subject to the same disability as a resident in enemy territory. "This law," said Lord Reading C. J. in *Porter* v. *Freudenberg* (1), referring to the denial to alien enemies of a right to sue, "was "founded in earlier days upon the conception that all subjects "owing allegiance to the Crown were at war with subjects of "the state at war with the Crown, and later it was grounded "upon public policy, which forbids the doing of acts which "will be or may be, to the advantage of the enemy state "by increasing its capacity for prolonging hostilities in adding "to the credit, money or goods, or other resources available "to individuals in the enemy state." This consideration equally applies to a claim sought to be established in our courts by a resident in enemy-occupied territory, for if the claimant succeeds an asset in the form of an award or a judgment is created which the occupying power can appropriate and which is calculated to increase the enemy's resources.

6. The common law disability to sue in such cases cannot be regarded as got rid of because Emergency Regulations would prevent the transmission abroad of the sum recovered. The asset would be created, even though it necessarily remained here till the end of the war. Such an asset might well operate as security for an advance to the enemy from a neutral lender.

7. The operation of the rule refusing persona standi in judicio is always subject to permission being given by royal licence. In the present case, no application for a royal licence has been made.

For these reasons, I find myself obliged to differ from the Court of Appeal and to move that the appeal be allowed with costs here and below. As I have said, this conclusion makes it unnecessary to deal at length with the other ground of appeal touching the retainer of the respondent's solicitor. On this point also I agree with the view expressed by my noble and learned friend Lord Porter.

Lord Atkin (read by Lord Thankerton). My Lords,

(1) [1915] 1 K. B. 857, 867.

having had the opportunity of reading in advance the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and agreeing with them as I do, I add but a few words. The rule precluding an alien enemy from the right of suit is based on public policy—the protection of the state in time of war—but the need of the state for protection varies with the increasing dangers of modern war as compared with the warfare of earlier days. The result is that earlier decisions have to be measured in the light of this consideration. "Total war" is a more or less modern development of civilization, but its practice and effects have an important bearing on the problem of the position of the resident in an occupied country. The question that is in dispute is the right of the resident in enemy occupied country to enforce by suit in this country civil rights whether by contract or otherwise, a question which will generally concern rights claimed to arise from commercial transactions. When a British court has to consider what is the nature and extent of the enemy occupation which makes the resident an enemy, I think that in these days one of the most important tests would be the extent to which the enemy, while in occupation, assumes to control the civil rights of the subjects of the occupied country. And if that control be for the material time effective I am inclined to think that it matters not that the enemy contemplate to withdraw that control at some future time or on some future event, whether distant or not. I have no doubt in this case that the enemy effectively control the commercial operations of the respondents in Holland, and that a successful judgment in this action would directly or indirectly enure to the enemy benefit, and that the respondents are precluded as enemy aliens from suing in these courts without the licence of the Crown.

I need only add a few words as to the decision of the Privy Council in prize in *The Gerasimo* (1), which has the great weight of the authority of Lord Kingsdown. The decision itself can plainly be supported on the facts, but the opinion goes further than was necessary, and it would appear that Lord Kingsdown took the view that to constitute an alien enemy it was necessary that the territory, either by cession or conquest or some other means, should, either permanently or temporarily, be incorporated with and form part of the dominions of the invader. My Lords, it seems to me quite inconsistent with

(1) 11 Moo. P. C. 88.

the public policy on which the rule is based that an invader should assume complete control of the government of a territory but, by disclaiming any intention to incorporate it or make it part of his dominions, free its residents from the disabilities of enemy character in these courts. I have no doubt that if Lord Kingsdown had had to appreciate the methods of modern warfare he would have framed his sentence differently. It is expressed more widely than was necessary for the particular case. It is inconsistent with the subsequent decision of the Privy Council, also in prize, in *The Gutenfels* (1). I doubt whether it would be followed in prize in these days. It certainly is not binding on this House and I cannot agree with it. I am of opinion that the appeal should be allowed.

Lord Thankerton. My Lords, I have had the privilege of considering the opinions about to be delivered by my noble and learned friends, Lord Wright and Lord Porter, and I agree with them and, in particular, with their careful review of the authorities and their comments on the dicta of Dr. Lushington and Lord Kingsdown in *The Gerasimo* (2). I should, however, like to add a reference to some of the few early Scottish cases, as I am satisfied that there is no difference on this matter between the law of England and the law of Scotland.

In *Blomart* v. *Roxburgh* (3), the defender alleged that the pursuer "could have no process, being of the United Provinces, "who are declared enemies to His Majesty. It was answered, "that there was no denunciation of war by His Majesty as "King of Scotland, nor any proclamation in Scotland to that "purpose. It was replied, that there was a warrant by the "King and council to seize upon all the Dutch vessels in "Scotland. The Lords found that this was but an embargo, "and no denunciation of war in Scotland; and therefore "found process." This expresses the difference between a casus belli and a state of war, though recent history has at least obscured this distinction. In *Arnauld and Gordon* v. *Boick* (4), Arnauld, a merchant in Rouen, and his attorney in Edinburgh, Gordon, sued Boick, a merchant in Edinburgh, for the price of some hats and counterfeit pearl sent home to him. The report states: "Boick alleged, no process at "Arnauld's instance, because, being a subject of the French

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(1) [1916] 2 A. C. 112.

(2) 11 Moo. P. C. 88.

(3) 1664 Mor. Dict. 16,091.

(4) 1704 Mor. Dict. 10,159.

"King's, with whom we are at war, they can pursue no action "during the dependence and continuance of the war, for "hostes publici, as they have not jura commerciorum, so "neither have they leg(it)imam personam standi in judicio, "nor jus persequendi actiones. And, if this were the cause "of a Scotsman pursuing a Frenchman before the Parliament "of Paris, he would not only be denied action, but the "sum would be confiscated to the public; which is not "here craved. Answered, whatever the authors of the war "may deserve, or merchants may suffer by captures of "their ships and goods at sea, yet it is hard to extend it "to private persons craving their just debts, the denying "whereof is against the faith of trade; and by the late "Act of Parliament 1703, allowing an indirect trade with "France for importation of wines, this rigour seems to be "dispensed with. The Lords refused to sustain process at "the French merchant's instance." Then Gordon produced a bill of exchange giving him right to the sum, which the Lords likewise repelled, because the summons was not pursued in his name on that proper right of his own, but only as factor for Arnauld, and would not let him transform his summons thus by way of reply. The reference to the Act of Anne, 1703, c. 2, is interesting as it appears to be an illustration of a statutory modification of the general rule, although it does not expressly mention importation from enemy countries. The War of the Spanish Succession had begun the previous year, and there can be little doubt that French wines were the popular ones in Scotland. It leaves it uncertain whether the exporting French merchant could have recovered his debt in the Scottish courts during the war. During the Napoleonic wars three cases are reported. In *Carron* v. *Charles Cowan & Co.* (1), a foreigner resident in Denmark charged on a bill and the Scottish debtor was ordained by the Lord Ordinary in a suspension of the charge to consign the amount. At the time of the charge war between Denmark and this country had broken out. On a reclaiming petition by the suspender the court remitted to the Lord Ordinary to sist procedure. In *Wright* v. *Hutcheson* (2), where the facts were similar to those in *Carron's* case (1), the court, ex proprio motu, followed the same course, and, in both these cases, the court refused to allow the enemy alien the advantage of consignation or security during the dependence of hostilities. The third case was that of *Burgess* v.

(1) 28 Nov. 1809 Fac. Coll.

(2) 17 Jan. 1810 Fac. Coll.

Guild (1), in which Guild, owner of the *Nimble*, brought action in the Judge Admiral's court against Burgess, American owner of the *Hannibal*, which, on entering Leith Harbour, had collided with the *Nimble*. The latter vessel sank in fifteen minutes, and the owner sued for the value of ship and cargo, and arrested the *Hannibal* in security. The Judge Admiral decided in favour of Burgess, who then raised a counter-action for damages for the detention of his ship, and the Judge Admiral again decided in his favour. Guild raised a reduction of both decrees in the Court of Session, and Burgess also raised a reduction in so far as he had not got enough damages. Then hostilities broke out between America and this country, and the Lord Ordinary reported the case to the court, who desired and obtained the opinion of His Majesty's Advocate-General, Sir Christopher Robinson, and, in accordance with that advice, allowed Burgess to proceed in respect that his action was a counter-action. As regards recent cases in Scotland, I need only add a reference to *Orenstein & Koppel* v. *Egyptian Phosphate Co., Ld.* (2), and *Gebruder Van Uden* v. *Burrell* (3) and, in particular, to Lord Skerrington's opinion in both cases. I agree with the comments of my noble and learned friend on the woolsack on *Van Uden's* case (3).

There can be no doubt that the prohibition of intercourse with an alien enemy rests on public policy which requires that no act shall be done or permitted which may injure the interests of the state either directly or indirectly by benefiting the enemy state. The means by which such injury may arise will naturally vary to some extent from age to age, for instance, the effect of scientific discovery in the last century on means of communication in many differing forms has been revolutionary, and it is clear that the court is bound to consider these changes in applying the general doctrine. You can define the general doctrine, but you cannot stereotype the cases in which it is to be applied.

One other observation I desire to make. The question of an enemy-occupied country in relation to the doctrine must depend on the nature and extent of the occupation in the particular case. It may be said to be a question of degree. In the present case I have no doubt that the enemy occupation is of such a high degree as to place Holland—for the purposes of the doctrine—in the same position as enemy territory. The Dutch sovereign and government, in any effective sense, are outside Holland, and the enemy are fully in both civil and military control. I concur in the motion proposed by my noble and learned friend on the woolsack.

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(1) 12 Jan. 1813 17 Fac. Coll.

(2) 1915 S. C. 55.

(3) 1916 S. C. 391.

Lord Wright. My Lords, the authority given to the respondents' solicitors by the Trading with the Enemy Branch (Treasury and Board of Trade) distinguishes between the two main principles under English law which apply to the position of the enemy subject in time of war. These principles are separate, but they are closely related. One is that he is denied access to the English courts, the other is that British subjects are prohibited from trading with him and from all intercourse or communication across the line of war. Both principles depend on rules of English municipal law, and both have their foundation in the ancient common law. In the eighteenth century Lord Mansfield C.J. relaxed the latter principle in commercial matters, at least as regards insurances on enemy goods against British capture. He seems to have preferred business convenience to the national policy in war, although he records the view of the judges declared to Lord Somers and later reported by him to Lord Hardwicke that trading with the enemy was a misdemeanour at common law. So this is stated in his judgment in *Gist* v. *Mason* (1). But Lord Mansfield's heresy was explicitly and finally rejected in 1794 by the Court of King's Bench in *Brandon* v. *Nesbitt* (2), and in *Bristow* v. *Towers* (3), both actions on marine policies for loss by British capture. In the latter case, in particular, the elaborate arguments of counsel may still be read with profit, especially that of the defendant's counsel, Mr. Park (afterwards Park J.), who quotes (4) Valin's observation that by these insurances "one part of the nation rendered back to "France what had been taken by the other by the right of "war." Lord Kenyon, in delivering the judgment of the King's Bench in *Brandon* v. *Nesbitt* (5), said that "an action will not "lie either by or in favour of an alien enemy." The action there was brought by the broker for the enemy aliens who urged that, as he had a set-off greater in amount than the claim, no money would pass to the enemy, but that plea did not avail him. The enemy's credit and resources would inevitably be increased by the judgment. The facts showed a trading with the enemy in that the voyage from London to France was prosecuted after the outbreak of war. In all cases of this character the fault may be cured by a licence or authority from the Crown. The authority given in the present case deals only with the matter of trading with the enemy, not with the inability of the enemy to proceed in court. The Court of Appeal rightly held that it was bad in that it could not operate retrospectively to legalize acts which at the time they were done were unlawful as being in breach of the Trading with the Enemy Act, 1939, and the Defence (Trading with the Enemy) Regulations, 1940, by which the special criminal offences are defined for the present war.

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(1) (1786) 1 Term Rep. 88.
(2) (1794) 6 Term Rep. 23.
(3) (1794) 6 Term Rep. 35.
(4) Ibid. 46.
(5) 6 Term Rep. 23, 28.

By reg. 3 of the Defence (Trading with the Enemy) Regulations, 1940, amending s. 2, sub-s. 1, of the Trading with the Enemy Act, 1939, " enemy " is defined as including "as respects any business carried on in enemy territory, any "individual or body of persons (whether corporate or unincorporate) carrying on that business." "Enemy territory " is defined by s. 15, sub-s. 1, of the Act to include "any area "which is . . . . in the occupation of a Power with whom "His Majesty is at war." It followed (so the court rightly held) that it was illegal for the solicitor to act for the respondents in this country without a licence, but, though the Court of Appeal held that the authority could not operate retrospectively, the court held that the difficulty was overcome by the concession on the part of the appellants' counsel that all the proceedings should be deemed to have taken place before October 13, 1941. By this transparent fiction it was, it seems, held that the parties could by their agreement waive a breach of the public and criminal law of the nation so as to render lawful what was illegal. I cannot bring myself to think that this was a proper or permissible course for a court to take, but I need not pursue it further as I am prepared to decide the appeal against the respondents on the other ground, namely, that it is incompetent for the respondents, being an enemy corporation, to proceed in court.

I feel, I confess, a natural repugnance to describing as enemies of this country those loyal and patriotic subjects of Holland who have had the misfortune to be forced to reside there after the German occupation, but this distasteful appellation has already been attached to all residents in

Holland, as the Court of Appeal have rightly and, indeed, inevitably held, by Parliament under the appropriate Act and regulations, and matters are not made worse if under the common law the respondent company is also to be deemed an enemy corporation. It is true that the statutory definitions dealing with trading with the enemy and the custody of enemy property are limited to the purposes of the Act and regulations and do not impinge on the common law in regard to the separate question of an enemy's competence to sue. On the whole, however, I think that these definitions, at least in their latest form, do substantially agree with the definitions of enemy and enemy-occupied territory reached by the common law in the authorities which I shall cite.

The general question of law to be determined is whether enemy character as against one belligerent attaches to a person by reason of the fact that the previously neutral or friendly territory in which he resides or carries on business, that is, has his place of residence or commercial domicil, is subjugated and occupied by the other belligerent. Before examining the relevant authorities I should explain that the test which has been taken of enemy character in English law is not nationality, but domicil in the sense of settled residence or in the case of traders commercial domicil. Domicil in the strict legal sense is not necessarily relevant. Some of these cases were decided in the Prize Court, others in courts of common law. However, the right to sue or prosecute an action in court, the right to claim to be exempt from seizure and condemnation in prize, the liability to punishment for the offence of trading with the enemy, all depend alike on whether the person has enemy character in what has been called the technical or territorial sense. The test is objective and depends on facts, not on the person's prejudices or passions, his patriotism, or his determination to free his country whenever he can.

It is, I think, clear both on principle and on authority that a person resident or domiciled in an enemy-occupied country is in English law to be deemed to be an enemy, and, as such, subject to the same disabilities as an enemy in the ordinary sense while the occupation continues. It is, however, necessary to define what is meant by an enemy-occupied country in this context, and determine whether the facts justify the description being applied in any particular case. It might be better if the epithet applied were "enemy-subjugated." This would show that a mere temporary occupation, for instance, by a military force in the conduct of belligerent operations, is not enough. If the territory is to be deemed enemy territory, it must be subjugated, not merely occupied. It must be held under the dominion and control of the enemy for a period sufficient to give the occupation a settled and relatively permanent character and to show the intention to keep it. I do not think that the cases require that there should be formal acts, such as a cession by treaty or a public declaration of annexation. The matter must be decided as a question of fact with due regard to the character, purpose and intention of the occupation and the degree of dominion exercised. All acquisitions in war may be temporary. They may be abandoned on peace being declared, or surrendered or retaken under the pressure of superior force, but there is a sharp distinction between an occupation of territory by armed forces for strategical and temporary purposes and an occupation of territory as being a settled acquisition.

The Anglo-American authorities seem to confirm this view. I shall cite certain decisions which seem to me representative. I shall begin with *The Hoop* (1). In that case Lord Stowell (then Sir William Scott) condemned goods shipped in Rotterdam to merchants in Glasgow who had for many years been in the habit of procuring such goods from Holland before the irruption of the French into that country. The merchants had got the impression that, in virtue of 35 Geo. 3, c. 15, no licence was necessary, and had been so advised by the customs officials at Glasgow, and had not sought or obtained a licence. The goods were captured and were condemned by Lord Stowell in prize in 1799, though, as he confessed, with private regret. " But," he said (2), "if there is a rule of law on the "subject binding the court, I must follow where that rule "leads me." I particularly dwell on Lord Stowell's judgment because he made an elaborate survey of earlier cases in prize out of which I select two as illustrating how he understood the rule extending to enemy-occupied countries. One is *The Bella Guidita* (3), decided by the Lords of Appeal in 1785, relating to a cargo of provisions shipped from Ireland to Grenada. Grenada had been captured from Britain by the French in 1779, and was not restored to the British until 1783. The shipment and capture took place while the island was held by the French. The single question was, according to the record (1), "whether it was so unlawful for a British "subject to send supplies to the British plantations in the "Grenada islands [i.e. without a licence from the Crown] "whilst under the misfortune of a temporary subjection to "the French, as that a confiscation of the supplies so sent "should be the just and legal consequence of his misconduct?" The proprietors were (2) "British in principle and affection." Their position as British proprietors of the estates was so notorious that an Act was passed in 20 Geo. 3 to protect from British capture in prize shipments from Grenada of the produce of the island, but it did not apply to shipments to the island like the cargo in question which was of stores and the like necessary to work the plantation. The case was treated as one of trading with the enemy without a licence, and the condemnation of the cargo as French property (because of the enemy destination) was upheld by their Lordships. A similar decision was given in *The William* (3) (Lords of Appeal, December 19, 1795), which related to a shipment from Gaudelupe while in French occupation. I think it is clear from these citations that Lord Stowell treated the Lords of Appeal as drawing no distinction in this context between enemy territory in the ordinary sense and territory in the effective occupation of the enemy while that occupation lasted. In *The Bolletta* (4), the question was whether cargo, the property of merchants residing in the Ionian Islands, shipped in a Danish ship from Zante to Copenhagen was liable to capture on the ground that Zante was French territory. Lord Stowell (5) stated the issue to be whether the possession of the island by the French was "more than a mere temporary "possession." Lord Stowell (6) held that it was because "it was not an hostile occupation by force of arms liable to "be lost again the next day." The capture of the cargo had taken place on August 31, 1807. Under the Treaty of Tilsit concluded in the previous July, it had been agreed between Russia and France that France should have possession of the Ionian Islands. Possession of the island under the treaty had been effectively taken by France before the cargo was seized. It was held that the cargo was properly confiscated as being French property. On the other hand, in *The Fama* (7), the goods had been shipped for Louisiana after the date of the Treaty of Idelfonso under which Spain transferred the settlement to France, but Lord Stowell held that the nationality of the colony did not change until the actual possession had been changed under the treaty, and that actual possession had not been taken by the French before the seizure of the cargo was effected. Spain at the material time was still neutral and the goods accordingly could not be condemned as French property.

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(1) 1 C. Rob. 196.
(2) Ibid. 198.
(3) (1785) unrep. (see 1 C. Rob. 207).

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(1) 1 C. Rob. 209*n*.
(2) Ibid. 210*n*.
(3) (1795) unrep. (see 1 C. Rob. 214).
(4) (1809) Edwards 171.
(5) Ibid. 173.
(6) Ibid. 174.
(7) (1804) 5 C. Rob. 106.

It is, I think, clear that in these and other like cases Lord Stowell's opinion was that a territory changed its national character and acquired that of the conqueror if there were effective subjugation and firm possession with the intention of keeping the conquest, even though in the event the dominion of the conqueror was temporary and even though there was not either formal annexation or cession. What had to be considered was the nature of the occupation. A mere occupation in the course of and for purposes of military operations did not change the national character. These were cases in prize in which the issue was enemy or not enemy, but the same test was applied in a different connexion in *The Foltina* (1). The question there was whether the ship and cargo which were captured in 1811 in a haven or roadstead in Heligoland (which had surrendered to the British in 1807), had been captured in a British port so as to be properly treated as droits of Admiralty. Lord Stowell said that the chief point to be considered was whether at the time when the capture was made Heligoland formed part of the dominions of the Crown of Great Britain. "The island, it appears," he said (2), "had been conquered and taken possession of by British "forces, but the conquest had not been confirmed to this "country by a treaty of peace. It was a firm capture "in war, but was still subject to a kind of latent title in "the enemy, by which he might have recovered it at the "conclusion of the war, provided this country would have "consented to its restitution." As he later observed, it might be re-acquired flagrante bello by the state from which it was taken. He held that the vessel was captured in a British port. This illustrates the principle on which national character, in Lord Stowell's view, depends. In another place he requires for the change in national character, annexation or cession or possession for a sufficiently long time,

(1) (1814) 1 Dod. 450.

(2) Ibid. 451.

which, I presume, must depend on the facts, in particular, on the nature of the occupation.

The position of territory occupied by an enemy was discussed in the courts of the United States in connexion with the war between that country and England which lasted from 1812 to 1815. In one of these cases the question whether the nationality of the place had been changed was raised in order to determine whether the seizure of cargo was justified in prize. That was *Bentzon* v. *Boyle* (*Thirty Hogsheads of Sugar*) (1). The sugar was seized while on a voyage from Santa Cruz after the island had been captured by the English from Denmark and before it was restored to Denmark by the peace of 1815. The Supreme Court decided that the cargo was liable to confiscation on the ground that it had an enemy origin because it was shipped from British territory. Marshall C.J., giving the judgment of the court, thus stated the principle (2): "Although acquisitions made during war are not considered "as permanent until confirmed by treaty, yet to every "commercial and belligerent purpose, they are considered as "a part of the domain of the conqueror, so long as he retains "the possession and government of them. The island of "Santa Cruz, after its capitulation, remained a British island "until it was restored to Denmark." Another of the three cases was *United States* v. *Rice* (3), where the enemy character was raised in a different context. The question there was whether the acts of the British collector of customs at Castine during the occupation were invalidated by the subsequent restoration of the port. Castine, a port in the Penobscot district of Maine, had been taken from the United States during the war of 1812, and was held by the British until the peace of 1815. It was held by the Supreme Court that during the occupation Castine was a British port, subject to the British revenue taxes. Story J., delivering the judgment of the court, observed (4) that by the conquest and firm possession the fullest rights of sovereignty were vested in the British, the sovereignty of the United States was suspended, and their laws no longer ruled in Castine. The surrender of the port to the British created a temporary allegiance of its inhabitants, who were bound by such laws as the British chose to impose. There could be no allegiance where there was no protection of the laws. Castine was, therefore, a foreign port. To much

(1) 9 Cranch, 191.
(2) Ibid. 195.
(3) (1819) 4 Wheat. 246.
(4) Ibid. 254.

the same effect, Story J., in *United States* v. *Hayward* (1), held that Castine during the period of British occupation was no longer to be considered as a port of the United States with reference to their non-importation laws, and that, so far as respected the obligatory force of the laws of the United States, it was a port "extra ligeantiam reipublicae." The learned justice (2) relied on what Lord Stowell said in *The Foltina* (3) in the passage which I have quoted, but he pointed out that the allegiance and sovereignty of the British were temporary and the territory could not be regarded as incorporated (that is, permanently incorporated) in the dominions of the British Sovereign. He did not, I think, question that while the temporary allegiance continued the territory was within the dominion of a foreign power and outside the dominion of the United States. He was, I apprehend, considering whether, having regard to the possibility of recovery, what Lord Stowell called a latent title, jus postliminii, whether according to international or municipal law, would apply.

In 1857 the Privy Council decided the appeal in *The Gerasimo* (4). It arose out of the Crimean war. The question was what was the national character of the principalities of Wallachia and Moldavia. The main issue was whether a cargo which had been seized belonged to firms who could be considered as alien enemies, and that question turned on the nature of the possession which the Russians held of these principalities when the cargo was shipped from Galatz. The vessel was sailing under Wallachian colours. The cargo was condemned in the Prize Court. Dr. Lushington stated that Galatz, in which port the claimants resided, was in Moldavia, and that Moldavia was in possession of the enemy, and went on (5): "So long as any territory is in possession of the enemy, I "apprehend that the law declares that all the inhabitants "thereof, and all the persons resident therein and carrying "on trade are to be considered as enemies with respect to "that trade." I think that, on the authorities, this statement of law was too wide and unqualified. It is necessary to define the character of the possession. The condemnation was reversed in the Privy Council. Lord Kingsdown, who delivered the judgment of the Board, cited *The Dart* (6), *The Happy*

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(1) (1815) 2 Gall. 485, 502.
(2) Ibid. 501.
(3) 1 Dod. 450.
(4) 11 Moo. P. C. 88.
(5) Ibid. 95.
(6) (1808) Unrep.

Couple (1), and *The Manilla* (2). These were cases dealing with the peculiar position of St. Domingo after the negro insurrection. He cited also *The Santa Anna* (3), which was a case in which Cadiz was held not to be an enemy port, though the French armies were dominant in Spain, but the Spaniards were engaging in guerilla warfare and the British were supporting the insurgent Spaniards. The Crown had made a public declaration of amity with Spain, and, therefore, it was held that property of persons resident in those parts of Spain which were then under French control could not be condemned save for breach of neutrality. These were special cases heard on their particular facts. Lord Kingsdown also cited (4) from the common law courts *Donaldson* v. *Thompson* (5), a case relating to Corfu at the time, anterior to the Treaty of Tilsit, when a Russian garrison was quartered on the island, a case to be contrasted with *The Bolletta* (6). Lord Ellenborough C.J. (7) gave the operations of Sir John Moore's army as an instance of belligerent and temporary occupation, not changing the national character of the territory. Another case which he cited was *Hagedorn* v. *Bell* (8), in which there was an elaborate review of the orders and declarations of the government in respect of Hamburg which, it was held, prevented the court from treating that port as an enemy territory notwithstanding its occupation by the French. Lord Kingsdown did not, however, refer to the statements of the principle by Lord Stowell in the decisions cited, or by Marshall C.J. in the *Thirty Hogsheads of Sugar* (9). The conclusion at which Lord Kingsdown arrived was that the mere possession of a territory by an enemy's force does not in itself necessarily convert the territory so occupied into hostile territory or its inhabitants into enemies, and the question which had to be decided became simply one of the nature of the Russian occupation of Moldavia. This I think is unexceptionable so far as it goes. The Privy Council, on the evidence, held that the occupation was not such as to change the national character of the country. It was, in effect, merely provisional, connected with strategical considerations and not with the object of conquest. The cargo was, accordingly, released. But the principle stated by Lord Kingsdown in one part of his judgment goes further than is necessary for the decision of the case, and is not, in my opinion, consistent on one construction with the authorities to which I have referred. What Lord Kingsdown said was (1): "What are the circumstances necessary to convert friendly or "neutral territory into enemy's territory? For this purpose, "is it sufficient that the territory in question should be occupied "by a hostile force, and subjected, during its occupation, to "the control of the hostile Power, so far as such Power may "think fit to exercise control; or is it necessary that, either "by cession or conquest, or some other means, it should, either "permanently or temporarily, be incorporated with, and form "part of, the dominions of the invader at the time when the "question of national character arises?" He accepts the latter alternative as correct. The former sentence may be taken to describe what has been called belligerent occupation, which would not generally be regarded as changing the national character of the territory, but one reading of the alternative contained in the second sentence would seem to exclude cases like the occupation by the British of Heligoland and the captures in the West Indian islands in the French war or the subjugation of European countries by the Germans in the present war. A conquest during war may in a sense be temporary, as was that of Demerara by the French, and may be reversed either by reconquest or by surrender, but if while it lasts there is what is called firm possession for a sufficient period with the intention of keeping it unless it is reconquered or surrendered the national character of the place will generally, at least for the time, be changed. Perhaps Lord Kingsdown's language means no more than that when he speaks of a territory being temporarily incorporated with and forming part of the dominions of the invader at the material time. If it is so construed it is in harmony with the earlier decisions and is unexceptionable. It is clear on the facts that the Russian occupation of Moldavia was no more than a temporary military and strategical occupation. But if Lord Kingsdown makes the change in national character depend on formal acts or declarations it would not, in my opinion, be consistent with recognized authorities. The issue depends on fact, not on form.

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(1) (1808) Unrep.
(2) Edwards 1.
(3) (1809) Edwards 180.
(4) 11 Moo. P. C. 88, 99.
(5) 1 Camp. 429.
(6) Edwards 171.
(7) 1 Camp. 429, 433.
(8) (1813) 1 M. & S. 450.
(9) 9 Cranch, 191.

In 1862 the same principle was again affirmed by a majority of the Supreme Court of the United States in *The Amy Warwick* (2).

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(1) 11 Moo. P. C. 88, 96.

(2) (1862) 2 Black 635.

The case arose out of the civil war in America. A ship belonging to the Confederates had been seized by a Northern cruiser and was condemned in the Prize Court. The court differed on the question whether the principles of the belligerent rights of capture applicable to external wars applied to internal or civil wars. The majority of the court held that they did. The ship was condemned, the court saying that the seceding states should be regarded as being enemy and that all persons residing in the territory occupied by the insurgent government should be treated as enemies, though not foreigners.

Two authorities decided during the last war require to be noticed. In *The Gutenfels* (1), one issue was as to the national character of Port Said. It was there necessary to decide as one issue whether Port Said was, as regards Germany, an enemy port within art. 2 of the Hague Convention of 1907, Convention VI. The Judicial Committee held that it was, "having regard to "the relations between Great Britain and Egypt, to the "anomalous position of Turkey, and to the military occupation "of Egypt by Great Britain." The Board held that it was an enemy port vis-à-vis Germany by reason that it was a port under enemy control for purposes of the war. The German shipowners, accordingly, succeeded in claiming the benefit of the convention. The occupation there was not a mere temporary occupation for military purposes. The Board approved the language of Hall on International Law, 6th ed., p. 505: " When a place is militarily occupied by an enemy, "the fact that it is under his control and that he consequently "can use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil." This was said, no doubt, in reference to questions of public international law, but the same principle for determining enemy character would apply to questions of municipal law such as whether there is a right to claim a persona standi in judicio, whether there is a liability for the offence of trading with the enemy, and also whether property is subject to arrest or condemnation in a Prize Court. In *The Leonora* (2), one issue was whether a cargo of coal, mined from collieries in Belgian territory which was at the time in German occupation was of enemy origin within the meaning of the British retaliatory Orders in Council of 1915 and 1917. The coal was seized when being carried in a neutral ship from Rotterdam to Sweden, both places being neutral. The main issue was

(1) [1916] 2 A. C. 112.

(2) [1918] P. 182; [1919] A. C. 974.

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whether the orders were valid according to international law. The evidence did not merely show German occupation of the Belgian territory, but that the whole enterprise of getting the coal and selling and shipping it to the neutrals was conducted by a comprehensive system for the exploitation of the occupied territory and its produce under the control and for the advantage of the Germans. This illustrates what may be meant by German occupation in this and like cases. The issue was, therefore, not the bare question whether the coal was of enemy origin in the sense of being the produce of enemy occupied territory. In the Privy Council Lord Sumner, delivering the judgment of the Board, observed (1): "It is not necessary to "inquire whether, within the terms of the order, a Belgian "origin could, as such, be regarded as an 'enemy' origin for "this purpose, or what the effect, if any, of the German "occupation might be on the view to be taken of the nationality "of persons resident in Belgium." The judgment emphasizes the nature of the German control and the exploitation of Belgium. Certain cases, in which the national character of Belgium during its occupation by the Germans came into question, do not seem to me to help towards the elucidation of the common law relevant in this case, because they were mainly devoted to considering the various Trading with the Enemy Acts and regulations which were in force during the last war. One was *Société Anonyme Belge des Mines d'Aljustrel* (*Portugal*) v. *Anglo-Belgian Agency, Ld.* (2). The company there was incorporated under the laws of Belgium and had its registered office in Antwerp, which was within the territory occupied by the Germans. But the office in Antwerp had been closed and the business, which was the operation of mines in Portugal, was carried on de facto in London by three out of the five directors. It seems that, as the company was not commercially domiciled in Belgium, the common law point was very slightly touched on. *In re Deutsche Bank* (*London Agency*) (3), does not seem to me to examine the relevant common law in any detail.

The principles which I deduce from these authorities are that the inhabitants of enemy occupied countries in the sense I have explained, who before the subjugation were neutral or were enemies of the occupying belligerent, become enemies of those to whom they previously stood in a relation of allegiance or alliance so long as the occupation continues. This enemy character depends on objective facts, not on feeling, or sentiment, or birth, or nationality. They have been described as territorial or technical enemies. Their status is based on residence, or, if they are traders, on what has been called commercial domicil, which has the peculiarity that it may be attached to a trader who is not personally present in the occupied territory, but resides, for example, in a neutral country. He is an enemy vis-à-vis the other belligerent in respect of the particular affairs of trade in the occupied or conquered territory which give him a commercial domicil there. The occupied territory may merely be part of a larger territory which, so far as unoccupied, retains its national character. Lord Stowell's instance of the Isle of Wight which he gives in *The Foltina* (1), aptly illustrates the general rule. As to the actual status of Holland, no evidence was given. It might, perhaps, have been better if an application had been made for information to the Foreign Office, but the case proceeded up to this House on the footing of what was matter of common notoriety. It was accepted that metropolitan Holland had been occupied by and was under the dominion of the Germans. It is true that the Dutch government has been established in and recognized by Great Britain, and is the government to which, in theory, all Dutch subjects owe obedience, but in Holland itself that obedience cannot be enforced nor can that government protect its subjects resident there. Allegiance is generally dependent on reciprocal protection by the state. The Dutch government can give no such protection to its subjects in Holland. They are under the dominion and control of the Germans, who exploit them, plunder them, and tyrannize over them for the benefit of the German Reich. It is clear that the Germans do not intend to relinquish their possession unless forced to do so. However high may be the patriotic fervour of that loyal and valiant race and their devotion to the Allied cause, the Dutch, so far as they are in Holland, must, until the day of deliverance, submit to the German yoke and also accept the comparatively minor affliction of being described for limited purposes and occasions as being in law enemies vis-à-vis Great Britain. Such is the effect of the common law of England. They cannot sue or appear as actors in the English courts, they cannot trade with England, their property in England is subject to the

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(1) [1919] A. C. 974, 981.

(2) [1915] 2 Ch. 409.

(3) [1921] 2 Ch. 291.

(1) 1 Dod. 450, 452.

Trading with the Enemy Act and regulations. They are shut off from intercourse with Britain. The reason is that, while the occupation lasts, they are on the wrong side of the line of hostile demarcation, the line of war which shuts off those on that side of the line from communication and intercourse and commercial dealing with those on our side in substantially the same way as if they were originally enemies as nationals of, or resident in, the enemy state. This rule is only concerned with relations across the line of war. So far as concerns the internal commerce and ordinary activities of those in the occupied territory, such as those activities which the Master of the Rolls enumerates, the rule has no application, even though these activities go to promote the advantage of the German state and strengthen its war effort.

This may seem a harsh and irrational rule as against those of the Dutch, who are heart and soul in favour of the allied nations. But a general rule is necessary because, for one thing, there must be many traitors in Holland and many German nationals who have settled and taken up their residence and their commercial domicil in a great port like Rotterdam for business purposes before and since the war began. Such may be, in every sense of the word, enemies of the Allies, but there is the more fundamental reason which is explained by Lord Stowell. The harshness, however, is mitigated, because from early times it has always been the King's prerogative to grant permits and safe conducts or licences to enemies to relieve them from disabilities which would attach to them in their capacity of territorial or technical enemies. As it is the Crown which declares war or makes peace, the Crown may exempt from the enemy status particular territories or classes of the enemy state, or exempt particular individuals. The former course was adopted in the cases decided by Lord Stowell in reference to St. Domingo, or Spain, or Hamburg, by means of various statutes or public declarations. The latter course is adopted whenever a safe conduct or licence or permit is granted by the executive to an individual or individuals. In all these cases the disabilities of enemy status are pro tanto removed. The classic statement of the rule and its justification is given by Lord Stowell in *The Hoop* (1): "He alone therefore" (i.e., the Sovereign, acting by his constitutional advisers) "who has the power of entirely removing "the state of war, has the power of removing it in part, by

(1) 1 C. Rob. 196, 199.

"permitting, where he sees proper, that commercial intercourse "which is a partial suspension of the war. There may be "occasions on which such an intercourse may be highly "expedient. But it is not for individuals to determine on the "expediency of such occasions on their own notions of "commerce, and of commerce merely, and possibly on grounds "of private advantage not very reconcileable with the general "interests of the State. It is for the State alone, on more "enlarged views of policy and on consideration of all circum-"stances that may be connected with such an intercourse, to "determine when it shall be permitted, and under what "regulations. In my opinion, no principle ought to be held "more sacred than that this intercourse cannot subsist on any "other footing than that of the direct permission of the State. "Who can be insensible to the consequences that might follow, "if every person in time of war had a right to carry on a "commercial intercourse with the enemy, and under colour of "that had the means of carrying on any other species of "intercourse he might think fit ? " If this was true in Lord Stowell's day it is enormously truer now when the radiations of the modern credit system and of international trade are world-wide and when the possibility of international intercourse has been indefinitely increased by wireless and air transport. What Lord Stowell said is equally pertinent to the case of a temporary or territorial enemy who is resident or trading in an occupied country and to the case of an enemy in the ordinary sense. Lord Stowell added (1) : "Where is the "inconvenience on the other side, that the merchant should "be compelled, in such a situation of the two countries, to "carry on his trade between them, if necessary under the eye "and controul of the government, charged with the care of the "public safety ? " In the present case, it seems, no difficulty need have arisen if the respondent company had made a proper application for a licence to pursue their claim. Lord Stowell went on to consider the question whether an enemy had any right to appeal as an actor to the tribunals of this country, which is the primary matter in issue in this proceeding. He said : "In the law of almost every country, the character "of alien enemy carries with it a disability to sue, or to sustain "in the language of the civilians a persona standi in judicio. "The peculiar law of our own country applies this principle "with great rigour." Lord Stowell met in advance the

(1) 1 C. Rob. 200.

contention of the respondents that this is a separate and less stringent rule than the rule as to trading with the enemy. He said (1): "A State in which contracts cannot be enforced "cannot be a State of legal commerce." Indeed, the rule that an alien enemy cannot sue in our courts seems to be more ancient and more stringent than the rule against trading with the enemy, though both rules are equally corollaries of the status of enemy. Pollock and Maitland's History of English Law, 2nd ed., vol. i., p. 459, states the mediæval basis of the rule and also states how Littleton understood this disability. It also states the more limited rule accepted by Coke on Littleton, 129.b., which was "that no alien can "bring a real action, that no alien enemy can bring a personal "action, but that an alien whose sovereign is in league with "our own may bring personal actions." In 1697 Treby C.J., as reported in *Wells* v. *Williams* (2), laid down as settled law that "an alien enemy, who is here in protection, may sue his "bond or contract; but an alien enemy abiding in his own "country cannot sue here." Bullen and Leake's Precedents of Pleadings, 3rd ed., p. 475, give the stereotyped plea in abatement which was that the plaintiff was an alien enemy or became an alien enemy after the commencement of the action, quoting *Le Bret* v. *Papillon* (3). The court, it was held, was bound to take the objection even if it was not pleaded as soon as it came to the notice of the court.

It is, however, unnecessary to resurvey the law on this topic, because that has been done finally by Lord Sumner in *Rodriguez* v. *Speyer Brothers* (4). That was, indeed, in a dissenting judgment, but the matter of dissent does not go to his general statement of the law, which Sir William Holdsworth (History of English Law, vol. ix., p. 98, n. 5) has described as "the "best modern account of the position of the alien enemy at "common law." I must, however, refer a little more fully to that case, because it was relied on by the respondents for the proposition that the ancient rule denying a persona standi to an alien enemy at common law had been reduced to a rule of public policy. A rule of public policy seems to be used in this connexion as meaning a rule which is one which can be moulded by the court to suit the facts of the particular case, and can be rejected if the instance discloses to the judge no mischief from the point of view of public policy as understood

(1) 1 C. Rob. 200, 201.
(2) (1697) 1 Lord Raym. 282, 283.
(3) (1804) 4 East, 502.
(4) [1919] A. C. 59, 115.

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by the judge. This is quite contrary to Lord Stowell's statement that the common law applies this principle with great rigour and to the whole tenor of authority as set out in the judgment of Lord Sumner and also that of Lord Atkinson. I cannot think that the majority of their Lordships in *Rodriguez* v. *Speyer Brothers* (1) intended so sweeping a departure from settled law. The case must, I think, be limited to its special facts which were that a partnership of six, of which five members were English and one German, had been dissolved in 1914 by the outbreak of war and in the winding-up of the firm it was necessary to sue to recover a debt. The action was brought in the names of all the partners, including the alien enemy. Peterson J. dismissed the action for defect of parties on the ground that the German partner could not sue. His decision was reversed (2) by a majority of the Court of Appeal, composed of Bankes L.J. and Sargant J., Pickford L.J. dissenting, and their decision was affirmed in this House by Lords Finlay, Haldane and Parmoor, Lords Atkinson and Sumner dissenting. Lord Sumner caustically protested (3) against the ancient and settled rule being impinged on to save the alien enemy from the extra cost due to his advisers not obtaining the necessary licence or vesting the claim in the Custodian of Enemy Property. I do not think the decision is an authority beyond its precise facts. Such I take to have been the view of Lord Finlay from his observations (4). Lord Finlay did not overrule *M'Connell* v. *Hector* (5) (in which there were three partners, all British by nationality but two domiciled in Flushing, described as "a port belonging to the enemies of "this country" and an action by the firm was held to be incompetent) or *Candilis & Sons* v. *Harold Victor & Co.* (6). In any case, the decision is not one to be extended or treated as giving the court a general liberty to exercise the discretion which appertains to the Crown alone to give or refuse a licence in such cases. The discretion is for the executive and is not for the court. The observations of their Lordships in *Janson* v. *Driefontein Consolidated Mines, Ld.* (7) must not be ignored even though they have to some extent been qualified by subsequent pronouncements of their Lordships in this House. The precise limits of the doctrines of public policy have been much debated both before and since the speeches in *Rodriguez's* case (1). The observations of any one Lord cannot be regarded as fixing the law. Indeed, on an examination of the opinions of the majority in *Rodriguez's* case (1) considerable differences may be discerned. It would be impossible here to discuss these general questions, but I am tempted to ask whether the rule expounded by Lord Stowell does not differ from the familiar rules of public policy. These deal with internal affairs, contracts, dispositions of property, morality and the like. Lord Stowell's statement deals with matters of national policy, of affairs of state in international and belligerent relations. These, in particular, should be regulated by a settled rule of law subject to the responsible organs of government only if a discretion is to be exercised at all, and should not be left to "the idiosyncratic inferences of a few judicial minds" (to borrow Lord Atkin's phrase in *Fender* v. *St. John-Mildmay* (2)). I need do no more than refer to the authority of *Porter* v. *Freudenberg* (3). It may, indeed, be tempting to say that it is unjust that a Dutch company like the respondents should be debarred from prosecuting its proceeding to secure payment of a pre-war debt, but the answer is that, if it is debarred in fact in this action, it may be only because proper steps have not been taken to obtain a licence and that, if that is granted, as it may well be, a fresh proceeding can be initiated. The plea is not in bar, but in abatement.

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(1) [1919] A. C. 59, 115.
(2) (1917) 87 L. J. (K. B.) 171.
(3) [1919] A. C. 59, 131.
(4) [1919] A. C. 59, 76, 77.
(5) 3 Bos. & P. 113.
(6) (1916) 33 T. L. R. 20.
(7) [1902] A. C. 484.

But, whatever may be the view of the executive on consideration of a proper application, so far as concerns the court no particular reason appears on the evidence for distinguishing the respondents from any other Dutch company with a principal place of business at Rotterdam. The decision of the Court of Appeal would involve that any such company, and, indeed, any Dutch national resident in Holland, was free from any disability at common law and free to have intercourse and communication with and to trade with this country during the war except for the Trading with the Enemy Act and regulations. The same would be true of Northern France, Belgium, Norway and other occupied countries. The evils which might result from such untrammelled intercourse and trading are too serious and too obvious to need to be expatiated on. Information helping the enemy's war effort, trading increasing his war resources, could go on unimpeded save in so far as touched by the statute. The common law existed before and irrespective of the statutory provisions now in force. I may, however, note that a corporation differs from an individual in that the latter can, in theory at least, withdraw himself from the enemy country, whereas a corporation formed under the laws of a foreign state depends for its functions and existence on the laws of the state under which it is incorporated. This makes it at least difficult to apply to such a corporation, as the test of enemy or other character, the character of its agents or the persons in de facto control of its affairs. This was the test proposed by Lord Parker in the *Daimler* case (1), and applied by the Privy Council to a Dutch shipping company during the last war in *The Hamborn* (2). Holland was then neutral. In *Janson* v. *Driefontein Consolidated Mines, Ld.* (3), the House treated a company incorporated under the laws of the Transvaal to work gold mines there and carry on business, though not exclusively, there, as a subject of the Transvaal, ignoring the nationality of almost all the shareholders, and held that it became an alien enemy of this country when the South African war broke out. In the present case the respondents are subject to the control of the effective government in Holland, that is the German government, which can liquidate the company, appoint a sequestrator or administrator, eject or dominate the directors, and determine what use it makes of its business organization so as to promote the German war effort. Whatever immediately or prospectively increases the respondents' resources redounds to the benefit of the Germans. The services which they may be capable of rendering may be of great value to the coasting trade along the German occupied regions and to the trade up and down the Rhine. It is not in evidence where the directors are, or what is their nationality, or what business precisely the respondents carry on. But they remain vouched as still having their principal place of business at Rotterdam. In my opinion, the respondents became, when Holland was occupied and subjugated, technically alien enemies of this country. This is still so even though, as well may be the case, some of their vessels are being navigated by loyal and stout-hearted Dutch seamen in the service of the allied nations.

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(1) [1919] A. C. 59.

(2) [1938] A. C. 1, 12.

(3) [1915] 1 K. B. 857.

I ought finally, in passing, to note an observation of Holmes J. in *Birge-Forbes Company* v. *Heye* (4), that "there

(1) [1916] 2 A. C. 307.
(2) [1919] A. C. 993.
(3) [1902] A. C. 484.
(4) (1919) 251 U. S. 317, 323.

"is nothing 'mysteriously noxious' . . . . in a judgment for an "alien enemy." But when the case is looked at, the facts are seen to be that the judgment had been obtained by the plaintiff before the war. The plaintiff became an alien enemy, but an appeal against the judgment was permitted on terms that the amount should be paid to the clerk of the local court to be turned over to the alien property custodian if the judgment were affirmed. The enemy was already on the record and all he needed was to defend the judgment which he had got. He was not an actor in the appeal. I venture, however, to think that the English law is correct in considering that the mere fact that any money received could not go out of the country until the end of the war does not exclude the rule forbidding to an enemy a right of suit. It is also clear that to an alien enemy a judgment is a more valuable security than a simple debt and may be valuable for purposes of increasing his credit even during the war. This is pointed out by Lord Sumner in *Rodriguez's* case (1). It is even more obviously true to-day than in 1919. In my opinion the decision of the Court of Appeal is contrary to the common law and cannot be supported.

I ought in a few words to notice a further valid objection to the respondents' suit which is that the solicitor has no retainer. It is assumed that he had a retainer when he began the proceedings, but a retainer, like any other contract or employment, is abrogated when the client who is the principal becomes an enemy. The respondents relied on *Tingley* v. *Müller* (2). Perhaps it is enough to say that there is no power of attorney here in question as there was in that case. I confess, however, that I feel it at least difficult to follow the reasoning of the Court of Appeal. Scrutton L.J. examines the authorities in a powerful dissenting judgment which as at present advised I think correctly states the law. The precise question does not, however, arise for decision in this appeal. I concur in the motion proposed.

LORD PORTER. My Lords, this case exhibits an economy of fact which is almost embarrassing, but is nevertheless, as I think, sufficient to form a foundation on which your Lordships' conclusions may be grounded. The respondents are a Dutch company incorporated in Holland, which, at any rate, until Holland was invaded and overrun by the Germans,

(1) [1919] A. C. 59, 114.

(2) [1917] 2 Ch. 144.

carried on in Rotterdam the business of shipowners. How far that business continued to be carried on after the Royal Netherlands government had left Holland does not clearly appear, though the Court of Appeal were, on behalf, I believe, of the respondents, informed that all their vessels save one were now beyond enemy control. At least it is known that the business was carried on until the invasion of Holland and is still being carried on there by the company to the extent of suing for the sum claimed in this action, and there is no evidence either that it has altered the place of its activities, has ceased to carry on its business, is engaged in winding it up, or has made any changes other than those set out above. The result seems to be that the residence, or, as it has been called somewhat loosely but perhaps with sufficient accuracy, the "commercial domicil" of the company is still to be found in Holland. This, as I understand it, was the view of the Court of Appeal. "The question," said the Master of the Rolls (1), "is whether or not a company incorporated under the laws of "an allied country which has been occupied by the enemy is, "by reason of the mere fact that it continues to carry on its "business in that country, to be treated as an alien enemy to "the extent that it is incapacitated from taking proceedings "in the courts of this country with a view to recovering a "business debt," and du Parcq L.J.'s words were to the like effect.

No doubt, both in prize and at common law a person who is engaged in business in a country which becomes hostile but is not resident there is given a reasonable time to dissociate himself from that business if he wishes to avoid becoming an alien enemy, and even if he resides in such a country it may be that he will escape the imputation of hostility by removing himself from it as quickly as is reasonably possible (see *The Anglo-Mexican* (2)), but there is no suggestion that such a course has been taken on behalf of the respondents in the present case. The Dutch people and the Royal Netherlands government are our allies and friends, but Holland has been occupied by the German forces. Its lawful government and executive are to be found in this country, and there is no evidence that any other authority has replaced that driven out except German force and German executive decree, whether civil or military. I think enough is known to enable it to be said that Holland is now wholly controlled by Germany

(1) [1942] 1 K. B. 228.

(2) [1918] A. C. 422.

and its territory wholly occupied by that nation. It was contended on behalf of the respondents that business life and civil activities were still carried on under the protection of the Dutch, but no evidence was forthcoming of any Dutch substitute for the government which had been driven out and the only suggestion made was that the local authorities still remained and carried out their normal activities. I doubt whether, even if it were true, this would be enough, but, in any case, activities carried on under the dominating control of an occupying enemy force can hardly be said to follow their normal course. The inevitable conclusion must, I think, be drawn that Holland has been for some two years, and is at present, enemy-occupied territory, controlled and administered by the enemies of this country. If this conclusion be accepted, the question which your Lordships have to determine is whether a company incorporated and carrying on business in enemy-occupied territory is what is technically known as an enemy alien, and, if it be, whether it has any persona standi in judicio which would enable it to sue in this country. There were certain other questions raised in the case presented to your Lordships, but, if this question be answered in favour of the appellants, admittedly the decision must be against the respondents, and it is unnecessary to enter on any further inquiry. Before your Lordships no question arises as to the validity of the contract sued on. It was made with a company incorporated and carrying on business in a friendly state in time of peace. The only question is as to the procedural capacity of the respondents to sue at the present time. The distinction has been pointed out by Rowlatt J. in *Schmitz* v. *Van der Veen & Co.* (1), quoting from Lord Ellenborough's judgment in *Flindt* v. *Waters* (2).

Had the respondents' company been carrying on business in enemy territory I do not think that it could have been successfully argued that it was not in the position of an enemy alien and so disentitled to sue in the courts of this country. So long ago as 1802, in *Hector* v. *M'Connell* (3), Lord Alvanley C.J. said: "Every natural born subject of England has a right "to the King's protection so long as he entitles himself to "it by his conduct, but if he live in an enemy's country he "forfeits that right. Though these persons may not have "done that which would amount to treason yet there is an

(1) 84 L. J. (K. B.) 861, 864.
(2) (1812) 15 East, 260, 265.
(3) 3 Bos. & P. 113, 114.

"hostile adherence and a commercial adherence; and I do "not wish to hear it argued that a person who lives and "carries on trade under the protection and for the benefit "of an hostile State and who is so far a merchant settled "in that State that his goods would be liable to confiscation in a court of prize, is yet to be considered as entitled "to sue as an English subject in an English court of "justice." This language was expressly approved by both the majority and minority of your Lordships' House which sat to hear the appeal in *Rodriguez* v. *Speyer Brothers* (1). So in *O'Mealey* v. *Wilson* (2), Lord Ellenborough C.J. said: "If a British subject resides in an enemy's "country without being detained as a prisoner of war, he is "precluded from suing here." But it is unnecessary to multiply references to cases inasmuch as the principle that even a British subject voluntarily resident or carrying on business in the territory of a hostile Power is to be treated as an alien enemy has generally been accepted since the decision in *Porter* v. *Freudenberg* (3) in the Court of Appeal. Indeed, that case only follows what was said by Lord Lindley in *Janson* v. *Driefontein Consolidated Mines, Ld.* (4), and has often been said both before and since that time: " But when considering questions "arising with an alien enemy, it is not the nationality of a "person, but his place of business during war that is important."

The grounds on which access to the courts of this country has been denied to such a person and is denied at the present time are more difficult to ascertain. In 1797, in *Sparenburgh* v. *Bannatyne* (5), Eyre C.J. expressed the view that the true ground on which the plea of alien enemy has been allowed is that "a man, professing himself hostile to this country, and "in a state of war with it, cannot be heard if he sue for the "benefit and protection of our laws in the courts of this "country." The principle is there stated as stricti juris, and it is similarly treated in *The Hoop* (6), and later in *Esposito* v. *Bowden* (7), where Willes J. said: " It is now fully established that, the presumed object of war being as much to "cripple the enemy's commerce as to capture his property, "a declaration of war imports a prohibition of commercial "intercourse and correspondence with the inhabitants of the

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(1) [1919] A. C. 59.
(2) 1 Camp. 482, 483.
(3) [1915] 1 K. B. 857.
(4) [1902] A. C. 484, 505.
(5) 1 Bos. & P. 163, 170.
(6) 1 C. Rob. 196.
(7) (1857) 7 E. & B. 763, 779.

"enemy's country, and that such intercourse, except with the "licence of the Crown, is illegal." In *Porter* v. *Freudenberg* (1), Lord Reading C.J. says that: "This law was founded in earlier "days upon the conception that all subjects owing allegiance "to the Crown were at war with subjects of the State at war "with the Crown, and later it was grounded upon public "policy, which forbids the doing of acts that will be or may "be to the advantage of the enemy State by increasing its "capacity for prolonging hostilities in adding to the credit, "money or goods, or other resources available to individuals "in the enemy State."

Originally, I think, the view was taken that, sovereigns having declared war on one another, every subject of the one was the enemy of every subject of the other, but this outlook was gradually modified and altered. The development appears to have begun by a lessening of the stringency of view in favour of enemy subjects residing in and subjecting themselves to the protection of the Crown in this country as in *Wells* v. *Williams* (2), where it was held that an alien enemy commorant here by the King's licence and under his protection may sue. "It was answered and resolved," says the report, "that the necessity of trade has mollified the too rigorous "rules of the old law in their restraint and discouragement "of aliens," and as another report (3) has it, "suing is but a "consequential right of protection." It is a tragic commentary that the first report should continue (2): "A Jew "may sue at this day, but heretofore he could not, for then they "were looked upon as enemies. But now commerce has "taught the world more humanity." This attitude was accompanied or followed by a corresponding increase in stringency towards nationals of friendly or neutral countries voluntarily residing in or carrying on business in hostile territory. If the meaning of "hostile territory" be confined to the soil of the enemy State, the rule is, I think, clear, but does "hostile" in this connexion include neutral or friendly territory occupied by the enemy?

To this question I do not think it possible to give a certain answer which will apply to all cases. The solution, in my view, depends on the quality of the occupation, to be judged by the time it endures, the amount of control exercised, and the extent to which the former government is superseded.

(1) [1915] 1 K. B. 857, 867.
(2) 1 Lord Raym. 282.
(3) 1 Salk. 46.

These considerations are, in my opinion, the solution of the apparent conflict between the cases in which the inhabitants of occupied territory have been held to be alien enemies and those in which the opposite view has been taken. Two propositions found in Hall's International Law, 8th ed. (1924), on two consecutive pages, state the legal rule, I think accurately. On p. 603 it is said: "Although the national "character of a place and its inhabitants is not altered by "military occupation on the part of an enemy, yet for many "belligerent purposes they are necessarily treated as hostile "by their legitimate sovereign. They are in fact under the "control of the enemy, and to treat them as friendly would be "to relieve him from the pressure and losses of war." The limitation put on this assertion is to be found in the note on on p. 604: "The temporary occupation of a territory by an "enemy's forces does not of itself necessarily convert such "territory into hostile territory or its inhabitants into "enemies." For the former proposition he quotes the authority of an American case, *Bentzon* v. *Boyle* (*Thirty Hogsheads of Sugar*) (1), decided in 1815. The facts in that case were that the island of Santa Cruz had been captured from Denmark by the British and certain sugar, shipped thence on board an English ship, was captured by an American privateer. In condemning this cargo in prize as being British property, Marshall C.J. said (2): "Some doubt has been suggested "whether Santa Cruz, while in the possession of Great Britain, "could properly be considered as a British island. But for "this doubt there can be no foundation. Although acquisi-"tions made during war are not considered as permanent "until confirmed by treaty, yet to every commercial and "belligerent purpose, they are considered as part of the domain "of the conqueror, so long as he retains the possession and "government of them." An English case promulgating the same doctrine is to be found in *The Gutenfels* (3). On August 5, 1914, a German ship had entered Port Said in ignorance that war had been declared between this country and Germany, and the question arose whether an Egyptian port was, in reference to a German ship, an enemy port so as to bring it within the ambit of Rule VI. of the Hague Convention of 1907. The Privy Council sitting in prize decided that it was, and Lord Wrenbury in delivering the opinion of their Lordships

(1) 9 Cranch, 191.
(2) Ibid. 195.
(3) [1916] 2 A. C. 112.

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said (1): "Having regard to the relations between Great "Britain and Egypt, to the anomalous position of Turkey, "and to the military occupation of Egypt by Great Britain, "their Lordships do not doubt that it was. In Hall's International Law, 6th ed., p. 505, the learned author writes: "'When a place is militarily occupied by an enemy the fact "'that it is under his control and that he consequently can "'use it for the purposes of his war, outweighs all considerations founded on the bare legal ownership of the soil.' "Their Lordships think this to be right."

That these cases were decided in prize does not, in my view, prevent the application of the principle to questions involving the common law. In *The Hoop* (2), also a case in prize, Lord Stowell (then Sir William Scott) said: "What the "common law of England may be, it is not necessary, nor "perhaps proper for me to enquire; but it is difficult to "conceive that it can by any possibility be otherwise, for the "rule in no degree arises from the transaction being upon "the water, but from principles of public policy and of public "law which are just as weighty on the one element as on "the other, and of which the cases have happened more "frequently upon the water, merely in consequence of the "insular situation of this country; but when an enemy "existed in the other part of the island (the only instance in "which it would occur upon the land) it appears, from the "case referred to by that noble person" (Lord Mansfield) "to have been deemed equally criminal in the jurisprudence "of this country." The words already quoted from *M'Connell* v. *Hector* (3) support this view, and in the European war of 1914 Bailhache J. in *Mitsui* v. *Mumford* (4) discussed the truth of the contention that Antwerp after seizure by the Germans on October 9, 1914, was enemy territory and that business intercourse with persons in it was forbidden by common law. Though it was not necessary for him to decide these points he thought both contentions sound—the latter in spite of the fact that, as he says (5): "It amounts to this, "that a person, a subject of a friendly power, who at the "beginning of the war traded here and at Antwerp, cannot "write and send a business letter from this country giving "instructions to his Antwerp agent, as to his business there."

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(1) [1916] 2 A. C. 112, 118.
(2) 1 C. Rob. 196, 217.
(3) 3 Bos. & P. 113.
(4) [1915] 2 K. B. 27.
(5) Ibid. 33.

As authorities he quotes an American case, *The Rapid* (1), and *M'Connell* v. *Hector* (2). Another American authority to the same effect, which also was not a prize case, *United States* v. *Rice* (3), was decided by Story J. in 1819. During the war of 1812 the British government were for a time in military occupation of part of the province of Maine, and exacted import duties from the inhabitants, who, it was held, could not be compelled to pay import duties over again to the United States government when it had recovered the territory. The headnote is as follows: "By the conquest and "military occupation of a portion of the territory of the United "States by a public enemy, that portion is to be deemed a "foreign country, so far as respects our revenue laws. Goods "imported into it, are not imported into the United States: "and are subject to such duties only as the conqueror may "impose. The subsequent evacuation of the conquered "territory by the enemy and resumption of authority by the "United States, cannot change the character of past transactions. The jus postliminii does not apply to the case; and "goods previously imported do not become liable to pay duty "to the United States, by the resumption of their sovereignty "over the conquered territory." Story J. said (4): "During "this period the British government exercised all civil and "military authority over the place; and established a custom-"house, and admitted goods to be imported, according to "regulations prescribed by itself . . . . By the conquest and "military occupation of Castine, the enemy acquired that firm "possession which enabled him to exercise the fullest rights of "sovereignty over that place. The sovereignty of the United "States over the territory was, of course, suspended, and the "laws of the United States could no longer be rightfully enforced "there, or be obligatory upon the inhabitants who remained "and submitted to the conquerors. By the surrender the "inhabitants passed under a temporary allegiance to the "British government and were bound by such laws, and such "only, as it chose to recognize and impose. From the nature "of the case, no other laws could be obligatory upon them, for "where there is no protection or allegiance or sovereignty, there "can be no claim to obedience." These cases are, I think, sufficient to establish the truth of Hall's first proposition.

The qualification placed on the doctrine which I have quoted

(1) (1815) 8 Cranch, 155.
(2) 3 Bos. & P. 113.
(3) 4 Wheat. 246.
(4) Ibid. 253.

is taken in terms from the opinion of their Lordships of the Privy Council delivered by Lord Kingsdown (then the Right Honourable T. Pemberton Leigh) in prize in *The Gerasimo* (1). One of the questions in that case was whether the owners of cargo were alien enemies at a time when the Crimean war was being waged between this country and Russia. The owners carried on business at Galatz in Moldavia, and Moldavia was militarily occupied by the Russians, but Moldavia and also Wallachia, though under the suzerainty of Turkey at the time of the occupation, yet enjoyed an independent administration and, notwithstanding that the Russian occupation amounted to a temporary suspension of the suzerainty of the Porte and a temporary assumption of that suzerainty by Russia, yet the national character of these countries remained unaltered and any intention to alter it was disclaimed by Russia. The Russian Minister, indeed, stated (2) that " the occupation of "the principalities . . . . had been for Russia only a military "position, the maintenance or abandonment of which was "entirely a matter connected with strategical considerations." " Our august master," he continued, ". . . . has no desire ". . . . either to prolong indefinitely the occupation of the "principalities, or to establish himself there in a permanent "manner, or to incorporate them with his dominions, still "less to overthrow the Ottoman government." As Lord Kingsdown pointed out (3): " Moldavia and Wallachia were "not treated by the Porte as enemies, and it would be singular "if these countries, though not held to be enemies by Turkey, "should be held to be enemies of the Allies of Turkey." I have set out these facts somewhat fully in order to mark the exact circumstances which led to the decision of the Judicial Committee whose spokesman pointed out (4) that it was "necessary to examine carefully both the principles of law "which are to govern the case, and the nature of the possession "which the Russians held of Moldavia at the time of this "shipment." It is in the light of these considerations that the statement of law, so much relied on by the respondents, must be read. Lord Kingsdown set out the legal principles applicable as follows (5): " Now the question is, what are "the circumstances necessary to convert friendly or neutral "territory into enemy's territory? For this purpose, is it

(1) 11 Moo. P. C. 88, 101.
(2) Ibid. 104.
(3) Ibid. 105.
(4) Ibid. 95, 96.
(5) Ibid. 96.

"sufficient that the territory in question should be occupied "by a hostile force, and subjected, during its occupation, "to the control of the hostile power, so far as such power may "think fit to exercise control; or is it necessary that, either by "cession or conquest, or some other means, it should either "permanently or temporarily, be incorporated with, and form "part of the dominions of the invader at the time when "the question of national character arises? It appears "to their Lordships that the first proposition cannot be "maintained."

In terms this statement would seem to require a formal cession or conquest followed by a permanent or temporary incorporation of the occupied territory with the enemy state to make the inhabitants of the occupied territory enemy aliens as regards a country at war with the occupying power, and would seem to assert that to bring about this result it is not enough that the territory is occupied and controlled by the enemy, however complete the occupation and unlimited the control. If this be the meaning of Lord Kingsdown's words, I should not agree with them, but he was speaking with reference to the facts of the case under consideration in which it could not be said that there was even an attempt at civil control of the occupied provinces. It is enough, in my view, if it appears from the known circumstances, that the civil and military jurisdiction of the country is being exercised by the enemy to the exclusion of the former civilian rulers. Indeed, I can imagine a case where, though lip service was paid to the legal government of a country, yet in practice control was so exercised by an occupying power that in substance the territory formed part of the dominion of the enemy. At the present time when in international affairs formal acts have been largely dispensed with either as a preliminary to or during the course of a war, when declarations of war have ceased to be made and invasion follows immediately on declarations of friendship or neutrality, it is, in my view, essential to regard substance and not form.

There are a number of cases reported or mentioned in the reports which follow the same principle as *The Gerasimo* (1), most of which are referred to in that case. In *Bromley* v. *Hesseltine* (2), the question was whether a neutral resident in a place occupied by the enemy must on that account be regarded as an alien enemy. Lord Ellenborough C.J. held not,

(1) 11 Moo. P. C. 88.

(2) (1807) 1 Camp. 75.

saying (1): "I don't know that merely because an alien "happens to be resident in an enemy's country, goods to be "delivered for him at a neutral or friendly port are on that "account uninsurable. Suppose a British merchant to be "entrapped and confined in an enemy's country, it can scarcely "be said that all the trade he may still carry on is, in aid of the "King's enemies, illegal and incapable of being insured." Whatever may be said of this doctrine to-day it, at least, goes no further than to deal with the case of a merchant who, for all the evidence shows, may have been detained against his will in occupied territory. In *Donaldson* v. *Thompson* (2) a Russian Prize Court sitting in Corfu purported to condemn an American ship for breach of blockade and the question was whether the sentence of that court sitting under a commission from the Czar was valid, Corfu being then occupied by Russian troops. Lord Ellenborough held that it was not. "That," says the side-note, "is to be considered a neutral country for "this purpose, in which the forms of an independent neutral "government are preserved, although the belligerent may have "such a body of troops stationed there as in reality to possess "the sovereign authority." In the course of his judgment, Lord Ellenborough observes (3): "It is impossible to say "that the government of the Ionian Republic was superseded, "at a time when its institutions subsisted, and its supremacy "was recognized. How, then, was Corfu a co-belligerent? "Only because it endured a hostile aggression. Will any one "contend that a government which is obliged to yield in any "quarter to a superior force, becomes a co-belligerent with "the power to which it yields?" The case, however, deals only with the position of a prize court sitting in an occupied country in which the forms of an independent state were preserved, and it might well be held that the occupying country could not at the same time preserve the forms of neutrality and yet claim jurisdiction for a prize court in the country so treated. In *Hagedorn* v. *Bell* (4), Hamburg was in the military occupation of an overwhelming French force. Nevertheless, all the powers of civil government were administered in the same manner as they had formerly been before the arrival of the French. "I know of no case," said Lord Ellenborough (5), "where a country, maintaining its civil

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(1) 1 Camp. 75, 77.
(2) 1 Camp. 429.
(3) Ibid. 432.
(4) 1 M. & S. 450.
(5) Ibid. 458.

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"government proprio jure, has been considered as conquered. "That Hamburg was, at the time when this insurance was "effected, under French dominion, and had committed acts "to warrant this country to consider her as hostile, there can "be little doubt . . . . But . . . . still it belongs to every "state to pronounce upon the continuance either of amity, "hostility, or neutrality as between itself and any other "state." He then goes on to consider whether this country had elected to treat Hamburg as hostile and decided that she had not. The opinions of the other learned judges who heard the case were to the same effect. The decision primarily depends on the attitude of this country to the French domination. If, however, it be contended that the quality of French dominance comes in question, the case may even assist the appellants rather than the respondents as indicating that the control of an occupying power may, in circumstances other than those then in question, turn the inhabitants of the occupied territory into persons hostile to the enemies of the occupying power. Indeed, in the course of his judgment, Le Blanc J. said (1): " The principle, upon which the policy "of the law interferes, is this, that all trading with an enemy "tends to strengthen and assist the enemy, and is therefore "calculated to defeat the object for which war is entered into." Finally, in *Société Anonyme Belge des Mines D'Aljustrel (Portugal)* v. *Anglo-Belgian Agency, Ld.* (2), the Court of Appeal held that a company incorporated under the laws of Belgium and having its registered office at Antwerp was not an alien enemy at common law nor under the then subsisting Trading with the Enemy Acts and Proclamations. The company's business at Antwerp was closed and the books were removed to London where the business was then wholly carried on, but the chairman of the company was still at Antwerp, and, although he might still have been acting there on the plaintiff company's behalf, the business or some of the business of the company was de facto being carried on from London by three of the five directors of the company, all of them Belgians and resident in England. The plaintiff company owned mines in Portugal which were then being worked and the whole of the output was being sold in England and in France. Its managing director drew, as I understand, on its funds deposited with the defendants in respect of that business a cheque of which payment was refused on the

(1) 1 M. & S. 465. (2) [1915] 2 Ch. 409.

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ground that the company was an alien enemy. Younger J. in the court below expressed the view, afterwards supported in the Court of Appeal (1): "The plaintiff company is not in my "opinion an enemy of the King at common law. Although the "greater part of it" (i.e., Belgium) "is occupied by the German "army, Belgium has not yet been, and we may hope never will "be, annexed to the German Empire; and no Belgian is yet "the subject of a state at war with His Majesty. No authority "was adduced to show that the rule depriving an alien enemy "of any right to maintain an action in these courts . . . . "extends to a person who is not either the subject of, or "resident or carrying on business in, a state of war with His "Majesty." Lord Cozens-Hardy M.R. appears to have agreed with this view, and I think all the members of the court accepted the position that the plaintiffs were not enemies at common law, but the company was carrying on its business in England and the question really argued was whether it was incorporated in territory in hostile occupation and, therefore, an enemy alien under the then existing proclamations dealing with what constituted trading with the enemy. Younger J. thought it was, and Pickford L.J. had some doubts, but the other two members of the court held that it was incorporated, not in Antwerp, but in Belgium, and, as all Belgium was not in hostile occupation, the proclamation did not apply. The decision, so understood, is not contradictory of the propositions laid down by Hall.

I have ventured to detain your Lordships by a consideration of those cases most favourable to the arguments presented on behalf of the respondents because the principle at stake is of great importance and because a somewhat close analysis of the grounds on which they were decided seemed to be necessary if one was to arrive at what I believe to be their true effect. The result, as I think, of such consideration is to negative the contention that in no circumstances does the temporary occupation of a territory by an enemy's forces convert such territory into hostile territory or its inhabitants into enemies, and not to disturb the principle that in a proper case such an occupation is sufficient to produce that effect. In this connexion it is not, I think, helpful to ask whether the occupied country is a co-belligerent with the enemy unless one is careful to remember what is meant by that expression. The will, and indeed in some instances the hands, of the inhabitants

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(1) [1915] 2 Ch. 409, 413.

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of the occupied country are opposed to the occupiers and the last thing which they or the Royal Netherlands government desire is to fight on behalf of or give allegiance to a power whose occupation they detest. Nevertheless, a country whose ports may be used to shelter and refit enemy ships, whose workshops may equip and supply them, and whose inhabitants may be compelled, at peril of their livelihood, liberties or even life, to assist the enemy, may to that extent be loosely described as co-belligerent with the occupying power. The very residence and carrying on business in such a country may well amount to giving allegiance to the enemy however unwillingly it may be given. It is true, as Goddard L.J. points out (1), that a national of that country, *residing elsewhere* (the italics are mine), may only be deemed an enemy in respect of the business carried on in the occupied country. He may be guilty of a crime, albeit only of a misdemeanour, if he continues to have intercourse by trading with the enemy or in some other way, but he is not necessarily an alien enemy. The position, however, appears to me to differ toto caelo in a case where he resides and carries on business in the occupied country. I do not stay to discuss the further contention that a debt due to a business carried on as well as controlled by the enemy is property or interest in such business. For the purpose of this opinion I am prepared to assume that it is not.

With much of the principles set out in the judgment of du Parcq L.J. I find myself in agreement, and, in particular, with the view (2) that the question whether an individual in occupied territory is an alien enemy or not "must always "depend on the precise nature of the occupation . . . . on "the quality of the control exercised by the occupying power "and the obligations, if any, undertaken by, or imposed on, "the person whose status is in dispute." Where I differ is in the application of these principles to the facts of the present case. It is true that the Royal Netherlands government is still in existence, but it is in this country and is, as I think, prevented by force of arms from exercising its authority in Holland. I have no doubt that the inhabitants of that country as a whole are faithful to that government and would follow its commands if they could, but it is allegiance in fact, not willing allegiance, the fact of control, not the readiness of a country's submission to it, which is in question. In my opinion, if de facto the Germans are in complete control of

(1) [1942] 1 K. B. 222, 234.

(2) Ibid. 239.

Holland, those who reside and carry on business there must from that very fact be held to have given allegiance to them despite the fact that such allegiance would gladly have been withheld.

In expressing this opinion I have not forgotten that in certain cases where alien enemies were interested as " actors " it has been held that they could be, or could be joined as, plaintiffs. Two examples of recent date may suffice, namely: *Tingley* v. *Müller* (1) and *Rodriguez* v. *Speyer Brothers* (2). Each case was decided by a majority, Scrutton L.J. dissenting in the former, and Lords Sumner and Atkinson in the latter. Each case was, I think, regarded as an exception to the general rule and followed a line of authorities according to which an alien enemy who was not personally interested or was a subsidiary party whose interest was slight was allowed to sue in the courts of this country. In the latter case Viscount Haldane propounded the question (3): " Is the rule which "prevents an enemy alien from suing in the King's courts a "crystallized proposition which forms part of the ordinary "common law, and is so definite that it must be applied "without reference to whether a particular case involves the "real mischief to guard against which the rule was originally "introduced? Or is the rule one of what is called public policy, "which does not apply to a particular instance if that instance "discloses no mischief from the point of view of public "policy?" After an exhaustive consideration of the authorities he answered the question thus (4): "While I think that the "preponderance of authority down to this date has tended "to this treatment of the rule as a rule of ordinary law and "not as a mere case of applying policy, the courts have been ". . . . by no means unanimous, and I do not think that the "course of subsequent decision has materially affected this "conclusion . . . Under these circumstances I am of opinion "that it is open to us, as a supreme tribunal unfettered by "any decision of its own, to look at the reason of the rule "invoked. If we can do this I agree with the majority of "the Court of Appeal that it is premature to stop the action "at this stage from proceeding." Though the decision is binding on your Lordships, I do not think that this reasoning was the ratio decidendi of the other two noble and learned Lords constituting the majority of the House. Indeed, in

(1) [1917] 2 Ch. 144.
(2) [1919] A. C. 59.
(3) Ibid. 77.
(4) Ibid. 86.

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its breadth of statement, as the noble and learned Viscount recognized, it trenches on the observation of the Earl of Halsbury L.C. in *Janson* v. *Driefontein Consolidated Mines, Ld.* (1), that the courts cannot " invent a new head of public "policy" and that when it is said that things are unlawful because they are contrary to public policy it is meant that they " have been either enacted or assumed to be by the "common law unlawful, and not because a judge or court "has a right to declare" them to be so. Viscount Haldane, however, maintained (2) that " the observation must be taken "with the qualification that what the law recognizes as contrary "to public policy turns out to vary greatly from time to time."

In drawing this distinction the noble and learned viscount evidently accepts the view that anything which assists the enemy is always contrary to public policy, but is careful to point out that, on the one hand, certain types of act may at a given time be such as to afford assistance to the enemy though at another time they would not have done so, and that, on the other hand, certain types of act, which on earlier occasions and in other circumstances had been of assistance, may at a later date confer no benefit. Assistance to the enemy is always illegal, but the things which assist him may vary from time to time. Such a view is in accordance with the observations of Lord Watson in *Nordenfelt* v. *Maxim Nordenfelt Guns and Ammunition Co., Ld.* (3), and of Lord Parker in *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co. (Great Britain), Ld.* (4). " Their function" (i.e., the function of English tribunals), says Lord Watson, " when a case like the present "is brought before them, is, in my opinion, not necessarily "to accept what was held to have been the rule of policy a "hundred or a hundred and fifty years ago, but to ascertain, "with as near an approach to accuracy as circumstances "permit, what is the rule of policy for the then present "time." Lord Parker's words are : " The rule against trading "with the enemy is a belligerent's weapon of self-protection. "I think that it has to be applied to modern circumstances "as we find them, and not limited to the applications of "long ago, with as little desire to cut it down on the one "hand as to extend it on the other beyond what those "circumstances require."

The question, however, whether a given act is against public policy must, I think, be decided on general principles. It is not permissible to say that a particular act will not in fact assist the enemy. The proper inquiry is whether that act is of a class which is likely to assist him, and it is immaterial to ascertain whether in the individual case he may or may not be found to profit from it. In the present instance the respondents are technically enemy aliens and as such not entitled to sue. As Lord Stowell said in *The Hoop* (1): " It is not for "individuals to determine on the expediency of such occasions "on their own notions of commerce, and of commerce merely, "and possibly on grounds of private advantage not very "reconcileable with the general interests of the state. It is for "the state alone, on more enlarged views of policy, and on "consideration of all circumstances that may be connected "with such an intercourse, to determine when it shall be "permitted and under what regulations." But if it were necessary to ask whether in the particular circumstances now under consideration a judgment in the respondents' favour would be likely to assist the enemy, I should answer that it would. In the ramifications of modern financial transactions a recovery by legal action might well benefit an enemy who has shown himself astute to increase his resources by transferring to neutrals debts due to him from British subjects, leaving the former to collect from the British debtor the sums so transferred. I should agree with Lord Sumner's words in *Rodriguez* v. *Speyer Brothers* (2): " It is a fallacy to suppose "that everything turns on not remitting money to Germany "during the war . . . . Even if judgment only were recovered "against Señor Rodriguez without satisfaction, Herr von "Speyer would benefit at once by getting an interest in a "specialty debt secured by a charge, in lieu of an interest in "a debt only due upon a simple contract and unsecured. No "order to keep the cash in this country during the war would "deprive him of this immediate improvement of his position, "nor is it impossible that, in some neutral country where the "defendant may have property, he might actually recover "satisfaction in respect of some right under the English "judgment." In that sense the judgment will be for the benefit of an enemy during the war and not merely to use Lord Parker's words in the *Daimler* case (3), " the possible "advantage he may gain when peace comes."

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(1) [1902] A. C. 484, 491, 492.
(2) [1919] A. C. 59, 79.
(3) [1894] A. C. 535, 554.
(4) [1916] 2 A. C. 307, 344.

(1) 1 C. Rob. 196, 199.

(2) [1919] A. C. 59, 114.

(3) [1916] 2 A. C. 307, 347.

It is said, however, that to turn a neutral into an enemy it must be shown that he owes allegiance to a state at war with this country. I am prepared to accept this statement, but the inhabitants of an occupied country may by residing and carrying on business there come under allegiance to the occupying power, none the less that they hate that power and desire its extrusion and destruction. It is the act which counts, not the feeling which accompanies it. If he remains he puts himself under allegiance to a hostile state, temporarily it may be, but that is enough. Such a decision may seem harsh, and, indeed, must be distasteful when applied to a Dutch subject, but in war as now waged many things have to be done and steps taken which would gladly be forborne. Their defence is that they do or may contribute to the downfall of the enemy, an event so ardently desired that even members of a state whose government is our ally, but whose country is temporarily overrun, may welcome steps which in other circumstances we should deplore. I would add in the words of Lord Stowell in *The Hoop* (1): "It is said that these circum-"stances compose a case entitled to great indulgence; and "I do not deny it. But if there is a rule of law on the subject "binding the court I must follow where that rule leads me; "though it leads to consequences which I may privately "regret."

Before I close the observations which I venture to put before your Lordships one other matter should I think be discussed, namely, the authority of the respondents' agents to continue to represent them after the respondents have themselves become technical enemies. They had, it appears, appointed their arbitrator before the occupation of Holland and presumably their solicitors had been instructed before that time. The opinions expressed in your Lordships' House in *Daimler Co., Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*), *Ld.* (2) appear to accept the view that it would not be permissible for an enemy alien to appoint an agent after he had become such. Could then such an agent continue to act on behalf of one who was an alien friend when the appointment was made but had subsequently been placed in a position which compelled him to be treated as an enemy? *Le Bret* v. *Papillon* (3) is an authority for the proposition that an action commenced by an alien in peace cannot be continued by him in war, and

(1) 1 C. Rob. 196, 198.
(2) [1916] 2 A. C. 307, 347.
(3) 4 East, 502.

that in that respect he is in no better position than one who did not issue his writ until after war broke out, but it does not decide that the authority of an agent is withdrawn in the same circumstances. *Tingley* v. *Müller* (1) decided that in certain cases such an appointment continued to be effective since in that instance the Court of Appeal held that, though the respondent was an enemy alien, yet his agent validly appointed in time of peace could transfer to a British subject property owned by him in this country. Assuming, however, that that case was rightly decided, still it depends, as I have indicated, on its special facts and is an exception, as I think, to the general rule. Ordinarily, when the principal becomes an enemy the authority of the agent ceases on the ground that it is not permissible to have intercourse with an enemy alien, and the existence of the relationship of principal and agent necessitates such intercourse. That the representatives, legal or non-legal, of a litigant may require to have such intercourse with their principal in the litigation is, I imagine, clear, and I do not think it is an answer to say that in the event it may not be found necessary for the one to communicate with the other. At any moment the necessity may arise. The very relationship requires it even if it is desired only to terminate the mandate itself.

If authority be required for the proposition that the relationship of principal and agent is determined when the parties to the agency agreement become enemies one to the other, it is to be found in *Hugh Stevenson & Sons, Ld.* v. *Aktiengesellschaft für Carton-nagen-Industrie* (2). In that case an English company was not only the agent for a German company, but was also its partner, and after the partnership was dissolved by the outbreak of war continued to carry on business with the assistance of assets belonging to the latter. Your Lordships' House, affirming the decision of the Court of Appeal, and differing from that of the learned judge, held the German company entitled to be credited with a proper sum as remuneration for the use of their property, but a decision that enemy property on land cannot be expropriated in time of war has no bearing on the question of the continuance of the authority of an agent. Both courts below had held the agency determined and the point was not even contested on appeal to your Lordships. It is true that in that instance the agency was a mercantile one, but the prohibition of intercourse with an

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(1) [1917] 2 Ch. 144.

(2) [1918] A. C. 239.

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enemy is not confined to trade, and would, therefore, apply to a solicitor, who, at any rate in this country, is the mandatory of his principal for the purposes of litigation. This view is in accordance with that expressed by Scrutton L.J. in *Tingley* v. *Müller* (1), and by Lord Sumner in *Rodriguez* v. *Speyer Brothers* (2). If the majority of the Court of Appeal took a contrary view in the former case, with all due respect I am unable to accept their conclusions. Lord Sumner's opinion is not, I think, controverted in this respect by the views of the majority of their Lordships who sat to hear the appeal, nor is it contrary to the grounds on which their decision was reached. I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Lawrence Jones & Co.*
Solicitors for respondents: *Constant & Constant.*

(1) [1917] 2 Ch. 144, 177.
(2) [1919] A. C. 59, 130.

[PRIVY COUNCIL.]

AKERELE . . . . APPELLANT;

AND

THE KING . . . . RESPONDENT.

J. C.*
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Dec. 7.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Criminal law—Manslaughter—Negligence—Medical practitioner—Overdose of dangerous drug—Evidence—Evidence of other cases to rebut defence of idiosyncracy in relation to drug—Exercise of prerogative.

After the appellant, a duly qualified medical practitioner, had inoculated thirty-six children suffering from "yaws" with sobita, consisting of sodium bismuth tartrate, a trade preparation supplied in the form of a powder, five of the children died from stomatitis induced by bismuth poisoning. The appellant had himself dissolved the powder in sterile water, and gave the injections from a freshly mixed twenty-ounce bottle. He was convicted on a charge of the manslaughter of one of the children, based on the allegation that he had negligently prepared too strong a mixture of the sobita:—

Held, quashing the conviction, that negligence, to be criminal, must be gross, and that, the only negligence on which reliance could be placed being the single act of dissolving the powder in water, a criminal degree of negligence had not been proved merely because too strong a mixture had once been dispensed and a number of people made gravely ill.

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* *Present*: VISCOUNT SIMON L.C., LORD PORTER, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

Dicta of Lord Hewart C.J. in *Rex* v. *Bateman* (1925) 94 L. J. (K. B.) 791, at pp. 794 and 796 approved. *Reg.* v. *Noakes* (1866) 4 F. & F. 920, and *Reg.* v. *Crick* (1859) 1 F. & F. 519, referred to.

Evidence for the prosecution of the symptoms, illness and death of the other children was admissible in proof that the death the subject of the charge was not an isolated case which might conceivably be due to idiosyncracy in relation to bismuth.

The case fell within the rules governing the Judicial Committee in allowing an appeal in a criminal matter since the distinction between civil and criminal liability had been inexactly drawn, the ground on which a criminal charge was based had been ill-defined, and the instances of negligence had been increased from one to many by imputing a fresh act of negligence in the case of each death.

Dal Singh v. *The King-Emperor* (1917) L. R. 44 I. A. 137, referred to.

Judgment of West African Court of Appeal reversed.

APPEAL (No. 17 of 1942) by special leave from the judgment of the West African Court of Appeal (May 8, 1941).

The following facts are taken from the judgment of the Judicial Committee: The appellant in this case was a duly qualified medical practitioner who carried on practice in Nigeria. On March 7, 1941, he was charged before the assistant judge at Umuahia Sessions of the High Court of the Enugu-Onitsha Division in the Protectorate of Nigeria on three charges: (i.) Manslaughter contrary to s. 325 of the Criminal Code in killing one Kalu Ibe in May, 1940. (ii.) Reckless and negligent acts contrary to s. 343, sub-s. 1 (*e*), of the said code in giving medical treatment to the said Kalu in a manner so rash or negligent as to endanger human life or to be likely to cause harm. (iii.) Reckless and negligent acts contrary to s. 343, sub-s. 1 (*f*), of the said code in dispensing or administering medicine or poisonous or dangerous matter to the said Kalu. The assistant judge (Waddington J.), who tried the case without a jury, found the appellant not guilty on the second count but guilty on the first and third counts, sentenced him on the first charge to three years' imprisonment with hard labour and on the third to a fine of 100*l*. or twelve months' imprisonment with hard labour to run concurrently with the punishment awarded on the other charge, and refused bail pending an appeal. On appeal the West African Court

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of Appeal (Kingdon (C.J. Nigeria), Petrides (C.J. Gold Coast), and Paul (C.J. Sierra Leone)) quashed the sentence on the third charge, affirmed the conviction on the first charge, but varied the sentence to a fine of 500*l.*, and in default of payment to imprisonment with hard labour for twelve months. The appellant's case stated that, as a result of the conviction, his name was struck off the local medical register by the Board of Examiners for Nigeria. The fine was paid, but the appellant petitioned His Majesty in Council for special leave to appeal from the conviction and sentence of the Court of Appeal, and on November 27, 1941, his petition was granted by His Majesty in Council.

The facts giving rise to the charge were as follows: The appellant, in the course of his medical practice, was touring the Owerri Province in May, 1940, and the inhabitants of the districts of Asaga and Akanu were notified that they could be treated by him on the 6th and 7th of that month. According to a list kept by the appellant seventy-eight persons were treated at Asaga, of whom fifty-seven were children. Forty-four of those, of whom thirty-six were children, were dealt with on May 6, and thirty-four, of whom twenty-one were children, on the 7th. On the latter day the appellant proceeded to Akanu, where sixty-one persons were treated, of whom thirty-three were children and the remainder adults. With a few exceptions the patients appeared to have been suffering from an endemic disease known as yaws, which attacked both adults and children, causing lesions and ulcerations on all parts of the body, and, in particular, on the lower limbs and feet. Two methods of inoculative treatment for that disease were well recognized, the injection (i.) of N.A.B., an arsenical preparation, and (ii.) of Sobita, which consisted of sodium bismuth tartrate as given in the British Pharmacopœa, and was a trade preparation supplied to the doctor by a drug company in the form of a powder. It was common ground that the proper dose for an adult was three grains and for a child one. The appellant was accustomed to use the second specific, and on his visit to Asaga and Akanu he used it in the case of nearly all his patients. Following his treatment, ten children died, and there seemed to have been some other cases of sequent illness, but the history of the latter was only lightly developed. All the ten children who died came from Asaga, and it would appear from the evidence that five were inoculated on May 6 and five on May 7. No illness was reported from Akanu. The charge related to one of those children, namely, Kalu Ibe. At the trial, besides the testimony of his mother and half-brother, evidence as to his symptoms was given by Dr. Ibiam, a qualified medical practitioner, who had been called in to treat him, but not until ten days after the inoculation. In corroboration of that evidence the deposition was put in of Miss Margaret U. B. Reid, a district mission worker of the Church of Scotland at Asaga, who had seen the boy a day earlier. From that evidence it was apparent that he was suffering from stomatitis induced by bismuth poisoning. There was no dispute but that the poisoning resulted from the injection, and both Dr. Ibiam and a Dr. Henry, who was also called for the Crown, inferred that the subsequent death was caused by an overdose. The defence, on the other hand, maintained that Kalu Ibe was peculiarly susceptible to the effect of bismuth, and, therefore, unexpectedly succumbed to a dose which would have been harmless in the case of a normal child, and that in any case the negligence (if any) did not amount to criminal negligence. To show that the injection given was too strong, and to negative the suggestion that the boy's death was due to an exceptional reaction to sobita in his case, the Crown tendered evidence of the symptoms, illness and death of the nine other children.

1942. Oct. 28, 29. *Horace Douglas K.C.* and *Bernstein* for the appellant. There was no evidence of the administration of an overdose of sobita. The Crown was, therefore, thrown back on the evidence of witnesses who alleged that the observed effects could only have resulted from the administration of an overdose. According to the medical evidence, stomatitis may follow on the administration of a normal dose of sobita in cases of idiosyncracy in the patient. The sobita used by the appellant was made of the normal strength according to well-established practice, and for the supervention of stomatitis he could not be blamed. In the alternative, there could not but be on the evidence a grave doubt as to the appellant's alleged guilt, and he should have been given the benefit of the doubt. To establish criminal negligence the evidence must be such as to prove a high degree of negligence. There is no proof here of the negligent administration of a dose, and no proof of a gross or high degree of negligence: *Rex* v. *Williamson* (1); *Andrews* v. *Director of Public Prosecutions* (2).

(1) (1807) 3 C. & P. 635.

(2) [1937] A. C. 576, 581.

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Sir Donald Somervell A.-G. and *Preedy* for the Crown. The trial judge correctly directed himself in law, and there was sufficient evidence to support the conviction of the appellant for manslaughter. The judge quoted from *Rex* v. *Bateman* (1) and referred to Halsbury's Laws of England, 2nd ed., vol. ix., tit. "Criminal Law," p. 444, on the question of criminal negligence. In a case of this nature the evidence for the prosecution must be circumstantial, and, looking at the whole of the facts, the trial judge was entitled to come to the conclusion that there was criminal negligence. The evidence plainly established the administration of an overdose. Even if this Board sitting as a tribunal of first instance would not have come to the same conclusion on the evidence, no irregularity of a serious or substantial character has occurred, either by a disregard of the proper forms of legal process or by a violation of principle, so as to amount to such a denial of justice as would justify the Board in interfering with the judgment of the Court of Appeal. Where there is some evidence to support the finding, and the trial judge has not misdirected himself, this Board will not interfere: *Arnold* v. *The King-Emperor* (2); *In re Dillet* (3).

Horace Douglas K.C. replied.

Dec. 7. The judgment of their Lordships was delivered by Lord Porter, who stated the facts, and continued: The Attorney-General, while maintaining that it was open to him to support the conviction on the third charge on the ground that the sentence alone had been quashed, admitted that, if the conviction of manslaughter should not be upheld, the conviction of negligent dispensing or administering medicine could not be supported. It, accordingly, becomes unnecessary for their Lordships to consider either the propriety of recording a conviction on the two counts or whether the evidence would support a conviction on the third count.

The sole question is whether sufficient grounds were shown to persuade their Lordships that the case was one in which it would be proper for the Board, in accordance with the principles on which it acts, to advise His Majesty to grant the petition of appeal against the decision of the West African Court of Appeal upholding the conviction for manslaughter recorded by the learned assistant judge. In their Lordships' view the evidence of the symptoms, illness and death of the

(1) (1925) 94 L. J. (K. B.) 791.

(2) (1914) L. R. 41 I. A. 149.

(3) (1887) 12 App. Cas. 459.

other nine children was rightly received. The learned judge speaks of it as being "evidence of a course of conduct resulting "in these various consequences of which the death of Kalu "Ibe was only one." In their Lordships' view, no question as to a course of conduct arises, but the summing-up goes on: "The evidence is admissible in proof that Kalu Ibe's was "not an isolated case which might conceivably be due to "mere inadvertence or idiosyncracy in relation to bismuth "in Kalu Ibe himself." If the words "inadvertence or" are omitted this statement, in their Lordships' opinion, expresses the true ground for the admission of the evidence, and its propriety is, perhaps, better explained by the Court of Appeal when its president says: "The evidence of the "illness and death of other persons was tendered not to prove "the bad character of the appellant, nor to prove a course "of conduct or system, but to establish one of the essential "points which the prosecution had to establish . . . . that "such a large proportion of the other children who were "similarly injected by the appellant at the same time and "place had reactions similar to those of Kalu Ibe as to prove "that his reaction could not be due to his own idiosyncracy, "and therefore must be due to an overdose."

According to the appellant's own evidence, he himself dissolved the powder in sterile water and carried a twenty-ounce bottle made up for the day's work. It was made up, he said, fresh the same day. Strictly speaking, this evidence would lead one to suppose that the mixture injected at Asaga on the 7th was made up separately from that injected on the 6th, and if this were so some question might arise as to the admissibility of the effects of that administered on the latter date. But the appellant's counsel before their Lordships withdrew any objection to the admissibility of the evidence as a whole because he was anxious to make use of the argument that many of the patients on both days were unaffected—a result which could not, as he maintained, have been reached if the mixture had been dangerously strong. Even if only the events of May 6 are to be considered, not less than five children out of thirty-six, so far as their Lordships are able to ascertain, died after the first day's treatment, and from the description of the symptoms the courts in Nigeria were plainly justified in inferring that the cause was stomatitis resulting from bismuth poisoning. No doubt, an overdose might be given in one of two ways, either by injecting too much of a proper mixture or by injecting the right quantity of too strong a preparation. In the former case, the evidence would not be admissible as showing that because the appellant had been careless in one administration he was likely to be negligent in another, but it is clear that the charge was based on the latter suggestion, and, therefore, the evidence was admissible as tending to show, from the effect produced, the strength of the mixture in the bottle. The question, therefore, for their Lordships to determine is whether it is proved that the appellant negligently prepared too strong a mixture on the morning of May 6, and, if so, whether that one act amounted to criminal negligence. Various other acts of negligence were at one time suggested by the prosecution, namely, that the accused failed to instruct his patients to come back after injection, and took no adequate steps to treat them after he was informed of their illness. These suggestions were subsequently withdrawn, and were rightly discarded by the learned trial judge in his summing-up. It is, therefore, unnecessary for their Lordships to pronounce on his criticism of the appellant's excuse, when he returned to Asaga on the 17th after having been informed of his patients' illnesses, that the fault was his " boy's ", and of his failure to treat them further. Their Lordships would only observe in passing that he did come back, that out of his own pocket he provided mouthwash and milk, that he endeavoured without success to enlist an assistant to continue the treatment, and that the excuse, admittedly false, and recognized to be false at the time it was made by those who heard it, was put forward when the appellant was in the midst of a hostile mob, some armed with knives, who were at least threatening him, and one of whom tried to kill him, though he ultimately managed to escape.

The learned trial judge found that the appellant negligently prepared too strong a mixture and that his negligence was criminal. In his summing-up he points out that the negligence on which the case rests lies, not in the manner in which the accused proceeded, but in what he injected, and relies on the evidence as to the deaths of the other nine children and on that of a government medical officer called for the defence who said that he only knew of ten to twelve cases of severe reaction in one thousand to two thousand sobita injections given by him, and that he would be shocked at a proportion of ten to fourteen out of seventy. The learned judge goes

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on to ask whether, on this evidence, it can be said that the accused was guilty of negligence in a criminal degree in causing the death of Kalu Ibe. No complaint can be made of what he says in reference to the degree which the courts have held essential to constitute a criminal offence of negligence. He quotes the observations of Lord Hewart C.J. in *Rex* v. *Bateman* (1): that a doctor is not criminally responsible for a patient's death unless his negligence or incompetence "went beyond a mere matter of compensation between subjects "and showed such disregard for life and safety of others as to "amount to a crime against the State," and adds from Halsbury's Laws of England, 2nd ed., vol. ix., tit. "Criminal "Law," p. 444: "What amount of negligence is to be regarded "as gross is a question of degree for the jury, depending on "the circumstances of each particular case." Both statements are true and, perhaps, cannot safely be made more definite, but it must be remembered that the degree of negligence required is that it should be gross, and that neither a jury nor a court can transform negligence of a lesser degree into gross negligence merely by giving it that appellation. The further words spoken by the Lord Chief Justice in the same case are, in their Lordships' opinion, at least as important as those which have been set out (2): "It is desirable "that, as far as possible, the explanation of criminal negligence "to a jury should not be a mere question of epithets. It "is, in a sense, a question of degree, and it is for the jury to "draw the line, but there is a difference in kind between "the negligence which gives a right to compensation and "the negligence which is a crime."

How necessary it is to keep this distinction in mind may be illustrated by reference to two cases. In a note to *Reg.* v. *Noakes* (3) it is said: "It is impossible to define it [i.e., culpable "or criminal negligence], and it is not possible to make the "distinction between actionable negligence and criminal "negligence intelligible, except by means of illustrations "drawn from actual judicial opinions." That was a case in which a customer sent two bottles to a chemist, one for aconite and the other for henbane. The chemist by mistake put the aconite into the henbane bottle with the result that the customer took thirty drops of the former and died of it. Erle C.J. left the case to the jury, but "put it strongly to them

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(1) (1925) 94 L. J. (K. B.) 791, 794.

(2) Ibid. 796.

(3) (1866) 4 F. & F. 921.

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"that they ought not to call upon the prisoner for his defence: "the case was not sufficiently strong to warrant them in "finding the prisoner guilty on a charge of felony." So in *Reg.* v. *Crick* (1), Pollock C.B., summing up in a case in which the prisoner, who was not a regular practitioner, had administered lobelia, a dangerous medicine, which produced death, said (2): "If the prisoner had been a medical man I should "have recommended you to take the most favourable view "of his conduct, for it would be most fatal to the efficiency "of the medical profession if no one could administer medicine "without a halter round his neck." The two cases quoted are, of course, only examples, but in their Lordships' view they do rightly stress the care which should be taken before imputing criminal negligence to a professional man acting in the course of his profession.

It is unfortunate that in the present case the two doctors called for the Crown were accustomed to use N.A.B. and had little, if any, practical experience of sobita, with the result that no information was forthcoming as to what excess of strength in the mixture would be required to produce the observed consequences in a normal patient, and how widespread among the medical profession is, or ought to be, the knowledge of the danger of an overdose. It may be conceded that both N.A.B. and sobita are dangerous drugs if not properly used, as Dr. Ibiam said, but the known margin of error is nowhere referred to. The trial judge ends his summing-up by saying: "The question now is, on this evidence, "can it be said that the accused was guilty of negligence of "criminal degree in causing the death of Kalu Ibe? We "have heard that sobita is supplied in powder form which "has to be dissolved in water in a certain strength. Evidently "this involves no matter of any particular technical finesse. "But accused in giving these injections managed to make "at least eleven persons gravely ill with symptoms of the "most revolting order. In the single visit to Asaga, when "he gave the injection to Kalu Ibe, out of a total of seventy-"eight, there were eight other cases besides this boy—a "proportion of over 11 per cent.—serious casualties all like "Kalu Ibe, through overdose of sobita. One would think "that in travelling the countryside, as is the accused's practice, "giving these injections on what may be termed a wholesale "scale, to these somewhat primitive people who have little

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(1) (1859) 1 F. & F. 519.

(2) Ibid. 520.

"knowledge of what to do if anything goes wrong and little "access to medical assistance, he would at least make as "certain as is humanly possible that he injects the correct "doses. In my view, the conclusion is inescapable that "accused acted with a degree of negligence that can only "be described as criminal." If, as their Lordships have indicated, the only negligence on which reliance could be placed is the single act of dissolving the powder in water before giving the inoculations, it is immaterial that the symptoms were revolting or that the result was to make many persons ill. The act had already taken place, and its observed consequences, which only showed themselves at a later date, could not add to its criminality. The negligence to be imputed depends on the probable, not the actual, result. It is unfortunate that the learned judge nowhere states in what he finds the negligence to consist, unless it be in its fatal consequences in so large a number of instances. If one may judge from his reference to the fatal consequences in the case of the other children, he seems to have thought that one death might have been due to inadvertence, whereas ten could not, and to have forgotten that one act only could be complained of, namely, the mixing of too strong a solution in making up the preparation. To hold this opinion is to impute to the accused repeated acts of negligence as if he were to be blamed for want of care in the case of each injection instead of the one act of carelessness in preparing the mixture to be injected. Moreover, the learned judge in the penultimate paragraph of his summing-up, quoted above, so far from considering whether gross negligence has to be proved, appears to think it enough if the appellant did not make as certain as is humanly possible that he injected the correct doses.

Their Lordships cannot accept the view that criminal negligence has been proved merely because a number of persons have been made gravely ill after receiving an injection of sobita from the appellant coupled with a finding that a high degree of care has not been exercised. They do not think that, merely because too strong a mixture was once dispensed and a number of persons were made gravely ill, a criminal degree of negligence was proved. In coming to this conclusion their Lordships do not find themselves in substantial disagreement with the judgment of the Court of Appeal in Nigeria save in one respect, namely, in their understanding of the grounds on which the learned judge based his decision.

That court, as they apprehend, did not itself pronounce on the facts, but inquired only whether the finding of the court below had sufficient evidence to support it. It did not consider whether the learned judge had sufficiently directed his mind to an analysis of the acts said to constitute a felony and to the degree of care required of a professional man against whom a criminal charge is preferred. Nor are their Lordships conscious of departing from the rules which they have laid down for their own guidance in considering whether they should allow an appeal in a criminal matter. "The exercise of the "prerogative," said Lord Haldane in *Dal Singh* v. *The King-Emperor* (1) "takes place only where it is shown that injustice "of a serious and substantial character has occurred. A mere "mistake on the part of the court below, as, for example, in "the admission of improper evidence, will not suffice if it has "not led to injustice of a grave character. Nor do the Judicial "Committee advise interference merely because they them-"selves would have taken a different view of evidence admitted. "Such questions are, as a general rule, treated as being for the "final decision of the courts below." Their Lordships are not in any circumstances prepared to differ from the courts below in a criminal case for any less cogent reason than those required by this statement. In this particular case, however, in their view the distinction between civil and criminal liability has been inexactly drawn, the ground on which a criminal charge is based ill defined, and the instances of negligence increased from one to many by imputing a fresh act of negligence in the case of each death. In the result, the case is one in which they consider that they ought humbly to advise His Majesty to allow the appeal and quash the conviction.

Solicitors for appellant: *Oldfields.*
Solicitors for respondent: *Burchells.*

(1) (1917) L. R. 44 I. A. 137, 140.

H. L. (E)*
1942
Oct. 30;
Nov. 2;
Dec. 4.

HICHENS, HARRISON, WOOLSTON AND COMPANY . . . . APPELLANTS;

AND

JACKSON AND SONS . . . . RESPONDENTS.

Principal and agent—Solicitor—Instruction to brokers to sell shares—Blank transfer signed by third party as transferor—Objection by transferor to registration of transfer—Purchase by broker of other stock to implement bargain—Liability of solicitor to indemnify brokers.

The respondents, a firm of solicitors, obtained a judgment on behalf of one E. against Mrs. L. The judgment being unsatisfied, certain furniture, the property of Mrs. L., was seized under a fi. fa. To avoid the sale of her mother's furniture, Miss L. offered to give the respondents, in satisfaction of E.'s judgment, her ordinary stock in the B. waterworks company. She deposited with the respondents the certificate and a blank transfer signed by her. The respondents sent the certificate and blank transfer to the appellants, who were stockbrokers and members of the London Stock Exchange. The respondents were well known to the appellants as solicitors on whose behalf they had carried out a number of previous stock exchange transactions. Finding that the market for the shares was better in B, the appellants sold them on the B. stock exchange to members of that exchange who were not members of the London Stock Exchange and who dealt, not as jobbers, but as brokers on behalf of a purchaser. The proceeds of sale were remitted by the appellants to the respondents who paid E. his judgment debts and costs and tendered the balance to Miss L. She refused to accept it, and objected to the registration of the transfer by the company, alleging that, though her signature was genuine, it had been obtained by fraud and compulsion. [No allegation of fraud was made in the present action.] Ultimately, the appellants purchased other stock to implement their bargain with the transferee, and brought an action, claiming indemnity from the respondents:—

Held, (1.) that the respondents, in giving instructions to the appellants to sell the stock, did so as principals and not as agents; (2.) that the vendor of shares is under a duty to deliver a transfer executed by a transferor who is, and continues to be, ready and willing that the subject-matter of the transfer shall be duly vested in the person named or to be named in the transfer; (3.) that, as the respondents did not fulfil their obligation to put the appellants in the position to complete the contract of sale which they had employed them to effect, they were liable to indemnify them; (4.) that the cost of buying substituted stock was the measure of the indemnity.

**Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

London Founders Association, Ld. v. *Clarke* (1888) 20 Q. B. D. 576, applied.

Decision of the Court of Appeal [1941] 2 K. B. 176 reversed.

APPEAL from the Court of Appeal.

The facts were stated by LORD ATKIN as follows: The respondents were a firm of solicitors practising at Ringwood, in Hampshire, and in 1939, acting for a client, Etchells, they had obtained judgment for 186*l.* and costs in an action for recovery of possession of premises and for mesne profits against a Mrs. Lucas, a tenant of the then plaintiff. Execution was levied and the goods were about to be removed for sale when Miss E. A. Lucas, a daughter of Mrs. Lucas, by letter of April 25, 1939, surrendered a certificate in her name of 250*l.* ordinary stock in the Bristol Waterworks Co. on the terms that the stock should be realized and the balance, after paying the amount due on the fi. fa., should be returned to her. At the request of the respondents she signed a blank transfer of the stock, and on April 25 the respondents sent written instructions to sell the stock to the appellants whom they had frequently employed before both for themselves and for clients. With the instructions they enclosed the blank transfer and the certificate for the stock. The respondents' letter was as follows: "Dear Sirs, We enclose herewith certificates "for 250*l.* consolidated ordinary stock in the Bristol Water-"works Co. together with blank transfer duly executed. We "shall be obliged if you will realize the stock for the best "price obtainable and let us have cheque in due course. "Yours faithfully, Jackson and Sons." On receiving these instructions the appellants made inquiries and found that the only effective selling market at the time was Bristol, and, accordingly, arranged with E. J. Evans & Co., a firm of brokers, members of the Bristol Stock Exchange, to sell the shares for them, which they did at 147½, realizing a net sum of 368*s*. 5*s*. Being advised by telegram of this sale, the appellants on April 26 wrote to the respondents a letter headed "A/c Miss E. A. Lucas," acknowledging their letter of April 25 and enclosing the contract note for the sale. The contract note, so far as material, was in these terms:

"Sold for account of Messrs. Jackson and Sons.

"Commission divisible with the above firm.

"Miss E. A. Lucas.

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					l.	*s.*	*d.*
"250*l.* Bristol Waterworks Co. Consolidated Ordinary							
" Stock					368	5	0
" To a Non-member							
" Settlement 11.5.38.	Commission	1	16	10			
	Contract Stamp		1	0	1	17	10
"					366	7	2

" Subject to the rules and regulations of the London Stock "Exchange.

" HICHENS, HARRISON, WOOLSTON AND CO.,
"Members of the Stock Exchange, London."

E. J. Evans & Co., on their part, had sold the shares to Grace, Darbyshire & Todd, a firm of chartered accountants, who were acting for one R. J. Fry. On April 26 they rendered bought and sold notes to Grace, Darbyshire & Todd and the appellants respectively in ordinary form. The sold note was addressed to the appellants: " We beg to advise having "sold on your account, subject to the rules of the Stock "Exchange," and ended: " Brokers contract. (Signed) E. J. "EVANS & Co., Members of the Stock Exchange, Bristol."

On May 11, the appellants, having received from E. J. Evans & Co. the name of R. J. Fry as the purchaser, sent to them the transfer completed with the purchaser's name, together with the certificate. The next day E. J. Evans & Co. sent the purchase price to the appellants, who on May 11 had sent their cheque to the respondents in a letter headed "A/c "Miss E. A. Lucas." They received an acknowledgment from the respondents dated May 12 in a letter headed " Etchells "*v.* Lucas. Account Miss E. A. Lucas." On May 12 the respondents sent an account to Miss E. A. Lucas with a cheque for 148*l.* 11*s.* 2*d.*, the balance of the proceeds of the stock after deducting judgment debt, costs, and charges. On May 15, however, Mrs. Lucas wrote to the respondents returning the cheque in favour of her daughter with a letter: "You have not sold my daughter's shares. I am making her "return this cheque. You will be good enough to send her "the script back at once." On May 19, Miss E. A. Lucas wrote to the Bristol Waterworks Co.: "I am writing to "ask you to hold up the sale of my shares till you hear from "my solicitors," and Mrs. Lucas wrote to the respondents: "I have stopped the sale of my daughter's shares until "the case against Etchells comes into court." On May 24

Miss E. A. Lucas wrote to the Bristol Waterworks Co.: "I "shall be obliged if you will return the script of my shares. "The matter has been settled out of court, and there remains "nothing but for me to ask you to return this to me personally," and on June 4 Miss E. A. Lucas wrote a letter to Mr. Picken, the registrar of the Bristol Waterworks Co.: "My signature "on the transfer deed is authentic, but it was obtained under "fraud and compulsion." This letter was sent to Mr. Picken under a covering letter from Mrs. Lucas. As a result the Bristol Waterworks Co. wrote to E. J. Evans & Co. on June 6, referring to a letter of May 17 received from them, enclosing the transfer from Miss E. A. Lucas to R. J. Fry and the certificate. They stated that "a letter purporting to be signed "by the transferor has been received containing objection to "registration" and that the directors would probably decide to decline registration "until any doubts concerning the "transfer have been disposed of." On receipt of this E. J. Evans & Co. wrote to the appellants asking them to put the matter right in course of post. The appellants passed this on to the respondents. The respondents replied that they were sorry that the appellants had been troubled. They gave an account of their possession of the certificate and transfer and said they trusted that that information would be sufficient to enable the transfer to be proceeded with in the usual way. The appellants passed this on to the Bristol Waterworks Co., who replied on June 12 that "in view of the "objections which the transferor had made to registration, "registration must be deferred until all doubts concerning "the matter had been dispelled." This was passed on by the appellants to the respondents "for your attention." In the meantime, E. J. Evans & Co. had received a similar instruction from the Bristol Waterworks Co., which they passed on to the appellants, stating: "We shall be glad, therefore, if you "will take steps to put the matter in order immediately." Some delay was arranged between the parties on the footing that the respondents were taking steps to have the matter put right, but the respondents failed to induce Miss E. A. Lucas to withdraw her objection. Counsel's opinion was being obtained by the respondents, and on June 24 E. J. Evans & Co. wrote to the appellants that they "will allow the matter to "stand over for one week further, but . . . . cannot let the "matter remain unsettled beyond that date." Eventually, on July 1, the respondents wrote that the effect of counsel's opinion was that "the matter is one entirely between the "purchaser of the stock and Miss Lucas." To this the appellants replied that the purchaser "is a member of a stock "exchange, and, according to the rules of the Stock Exchange, "the buying broker will, in default of delivery of the stock "buy in against us as your agent. Any loss involved in this "transaction will be payable by you as our principal." The matter then came into the hands of the appellant's solicitors. Meanwhile, E. J. Evans & Co. had written to the appellants on July 7 that they understood from a previous telephone conversation that it was intended to repurchase other stock to substitute the stock in question, and on July 11 the appellants wrote to E. J. Evans & Co. that they had that day been able to repurchase 250*l*. Bristol Waterworks Co. ordinary stock which was outstanding, and hoped to make delivery to them when they received it from the market. The stock was repurchased for a sum of 372*l*. 2*s*. 6*d*. On July 31, E. J. Evans & Co. wrote to know whether the appellants could now deliver the 250*l*. stock in substitution, as "the "buyer insisted on the matter being cleared up by the end of "last week." On August 8 the appellants wrote to E. J. Evans & Co. enclosing the duplicate transfer deed and, presumably, certificate. The appellants brought an action against the respondents "for 372*l*. 2*s*. 6*d*. and interest under "an indemnity or as damages for breach of contract and duty." Para. 3 of the statement of claim stated that by reason of their instructions to the appellants the respondents "(*a*) "impliedly warranted and agreed with the plaintiffs that they "had the right to sell and dispose of the said stock and that "they and the said Miss E. A. Lucas would do nothing to "prevent the transfer of the said stock to a purchaser thereof "or to prevent the Bristol Waterworks Co. registering the "purchaser as the holder thereof, and (*b*) were under the "duty to the plaintiffs to take all steps necessary to procure "such registration." Para. 3 of the defence stated that the request and instructions were given by the respondents "as "agents and not as principals, as the plaintiffs well knew, "and that they did not contract personally." No allegation that the signature of Miss E. A. Lucas was obtained by fraud was made in the action. At the trial J. W. St. John Whitehead, a member of the appellant firm, stated in evidence (*a*) that the reference in the contract note to Miss E. A. Lucas was to distinguish the transaction, and (*b*) explained the sharing of the commission by reference to the appellants' practice of treating all solicitors with whom they dealt as acting for clients unless they stated that they were dealing for themselves or their partners when, by the rules of the Stock Exchange, a broker might not share the commission. Viscount Caldecote C.J. gave judgment for the appellants for 396*l.* 19*s.* 1*d.*, holding that the respondents had contracted as principals and that they were liable to indemnify the appellants. The Court of Appeal reversed this decision holding (1.) that the respondents acted as principals, but (2.) that they had fulfilled their obligation by providing the appellants with a genuine certificate and a genuine transfer of the stock and were under no liability to indemnify them. The appellants appealed to the House of Lords.

Pritt K.C. and *H. G. Robertson* for the appellants. The respondents in employing the appellants as stockbrokers were principals as against them, or were agents so contracting as to be principals. Accordingly, the respondents are bound to indemnify them against all losses and liabilities incurred by them in the course of executing their duty towards the respondents. In selling the stock the appellants acted regularly and properly in execution of their authority as brokers and so were entitled to the indemnity in law. They became liable to deliver the stock to the purchasers. The respondents knew them to be members of the London Stock Exchange and subject to its rules, and intended them to sell in that capacity. In the circumstances the appellants were bound to purchase other stock for delivery and could have been compelled to do so by the committee of the Stock Exchange if the matter had been made the subject of a formal submission. They were entitled to purchase other stock for delivery without waiting to be compelled and the respondents were bound to indemnify them. Further, the respondents, as sellers of the stock and the appellants' principals, were under a duty to deliver stock capable of registration without objection by the transferor. They were bound not only not to do anything themselves to prevent the registration of the purchaser, but also to see that Miss E. A. Lucas did nothing to prevent registration. They were bound to provide regular documents of transfer and to put forward a transferor who remained competent, ready, and willing to transfer. The vendor of stock must provide every preliminary thing to enable the transfer to be completed and this includes a willing transferor. [They referred to *Stray* v. *Russell* (1); *London Founders Association, Ld.* v. *Clarke* (2); *Harper* v. *Herts* (3) and the rules of the London Stock Exchange, r. 120, sub-r. 1.]

Sellers K.C. and *Horniman* for the respondents. The respondents acted throughout as agents only, the principal being either Miss E. A. Lucas or Etchels. They had no interest in the stock and were mere intermediaries, being so treated by the appellants who knew they were acting for a client. This appears from the fact of sharing the commission and is also supported by the documents. The correspondence was headed " A/c Miss E. A. Lucas " and the blank transfer signed by her enclosed in the letter of April 25, 1939, shows that the respondents were disclosing a named principal. The contract of employment was one whereby the brokers were to sell the stock of Miss E. A. Lucas, and that did not involve making the respondents parties to the contract. It involved the brokers finding a buyer for the stock, which they did. There was then privity of contract between Miss E. A. Lucas and R. J. Fry and the intermediary parties dropped out. [They referred to *Pearson* v. *Scott* (4), and Bowstead on Agency, 9th ed., p. 283, art. 116.] Even if the respondents were principals, they have performed the contract entered into. Miss E. A. Lucas had not at the relevant time—May 11, settlement day—indicated any dissent from the validity of the transfer, so this transfer, which was handed over in satisfaction of the contract on that date, was valid then and it remained so. Since a document on the face of it valid was then handed over, the subsequent questioning of it cannot affect the matter unless it can be shown by the purchaser that the document was in fact invalid. It is not a breach of any implied duty of the vendor if some third party subsequently raises a question in relation to it. The purchaser takes the risk of an objection on the part of the company to registration, but in this case there was no reason why the company should not have registered the transfer. In this action there is no allegation of fraud against the respondents, and it would have been open to R. J. Fry, the transferee, to proceed against Miss E. A. Lucas by mandamus under R. S. C., Or. LIII. to secure his registration.

(1) (1859) 1 E. & E. 888.
(2) (1888) 20 Q. B. D. 576.
(3) [1906] 1 Ch. 549.
(4) (1878) 9 Ch. D. 198.

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There could have been no defence, and he would undoubtedly have succeeded and recovered his costs. Accordingly, the transferee is completely protected. [They referred to *Coles* v. *Bristowe* (1); *Grissell* v. *Bristowe* (2); *Davis* v. *Haycock* (3); *Reynolds* v. *Smith* (4); *Hooper* v. *Herts* (5); *Skinner* v. *City of London Marine Insurance Corporation* (6) and Palmer's Company Precedents, 15th ed., Part I., pp. 602, 603.]

Pritt K.C. replied.

The House took time for consideration.

1942. Dec. 4. LORD ATKIN. My Lords, this is a case arising out of a sale of shares by the appellants, a firm of stockbrokers, members of the Stock Exchange, London, who allege that they were employed by the respondents to make the sale and that by reason of the respondents' default in completing the sale they have incurred liability to the ultimate purchaser, and they seek indemnity accordingly. The amount concerned is relatively small, 396*l.* 19*s.* 1*d.*, but in the result the case has come to involve issues important to all persons who buy and sell shares, and it is well that it should have come up for consideration by this House. The facts are not in dispute, and once fully appreciated they seem to lead to an inevitable result.

The first question that has to be settled is whether the respondents are liable as principals to the appellants. They say that the appellants knew that the respondents were acting for a client, that the heading of the correspondence "A/c "Miss E. A. Lucas" indicates their intention to deal only with the respondents as agents, that the fact that commission was divided with them further indicates that they were treated as agents, and the fact that they enclosed a blank transfer signed by Miss E. A. Lucas shows that they were disclosing a named principal. In my opinion, none of these facts is of any avail to displace the written authority contained in the letter from the respondents, dated April 25, and the terms of the contract note sent to the respondents and accepted by them. The letter of authority is signed by the respondents without any qualification. I doubt whether any evidence is admissible to contradict it, but the fact that the

(1) (1868) L. R. 4 Ch. 3.
(2) (1868) L. R. 4 C. P. 36.
(3) (1869) L. R. 4 Ex. 373, 384.
(4) (1893) 9 T. L. R. 494.
(5) [1906] 1 Ch. 549.
(6) (1885) 14 Q. B. D. 882.

appellants supposed that the solicitors were acting for a client, or knew that they were, or even knew that the client was Miss E. A. Lucas (which is certainly doubtful) would have no effect to indicate that the appellants were regarding the respondents as anything but principals as against them. It is the commonest occurrence in business for known agents, known to be acting on behalf of a principal, to contract in their own names, often, indeed, because they desire not to disclose their principals to a rival in business. Mr. Whitehead, the appellant's partner, reasonably explained the reference to Miss E. A. Lucas in the contract note as mere identification of the transaction, and the share of commission by reference to the firm's practice to treat all clients who normally acted on behalf of their own principals as being agents unless they disclosed that the transactions were on their own personal account, in which case the brokers were precluded by the rules of the Stock Exchange from dividing the commission. The transfer from Miss E. A. Lucas conveyed nothing at all except that the solicitors had the right to have her stock conveyed. Both the learned Lord Chief Justice and the Court of Appeal were in favour of the appellants on this point, and I entertain no doubt that they were right. The Court of Appeal, however, came to the conclusion that the appellants had incurred no legal liability to the Bristol purchaser and that, therefore, no claim for indemnity arose. As to this there seems to have been some misunderstanding in the Court of Appeal of the case made by the appellants. MacKinnon L.J. stated that (1): " The whole basis of this claim rests on the allegation "that it was the duty of the defendants, not merely to hand "over a transfer valid in form with a certificate for the stock, "but also to secure or guarantee that the transfer would "be eventually registered by the company in the name of the "purchaser." This claim he very satisfactorily demolished, showing by authority that for the last eighty years it has been held that the vendor on a sale of shares does not guarantee registration, but the appellants maintained in this House that they had never made such a case in the Court of Appeal. This seems to be borne out by the opening words of du Parcq L.J. (2): " It is clear that the defendants performed "their duty when they handed over to the plaintiffs, acting "for the transferee, a duly executed transfer together with the "certificate. They were under no duty to procure the

(1) [1941] 2 K. B. 176, 189.

(2) Ibid. 192.

"registration of the transfer and it is not contended that they "were." One may pause to say that the respondents did not hand over to the appellants, acting for the transferee, the transfer and certificate. The appellants were the brokers acting for the sellers, and in no sense and at no time acted for the transferee. The lord justice went on to deliver a judgment in favour of the respondents on the ground that, while it was the duty of the seller " to do nothing to prevent the registration "of the purchaser," no such duty attached to him so far as interference by the transferor was concerned. Bennett J. took the same view.

My Lords, the obligations arising on an agreement to sell shares or stock have been firmly settled for a number of years and the case cited by MacKinnon L.J. (1) of *London Founders Association, Ld.* v. *Clarke* (2) is as good an authority as any. Lord Esher M.R. said that " the seller's liability is satisfied "by handing to the purchaser the transfer and the certificates "of the shares in proper form, and doing nothing either before "or subsequently to prevent the registration of the purchaser." In other words, he has to do all that is within his power to enable the purchaser to secure the object of his purchase, namely, to put himself into legal ownership of the shares. Of course, he does not guarantee that the company will not in the exercise of discretion, or for some reason independent of himself, decline to place the purchaser's name in the register of members. It appears to me unnecessary, and, perhaps, misleading, to express the obligation of the vendor in terms of a warranty or warranties. It is an obligation arising directly out of the contract of sale that he will furnish the purchaser with a valid transfer, and be and remain willing up to registration that, so far as he is concerned, the purchaser shall have the benefit of the transfer. If this is so, it seems to me to be entirely incongruous that the contract of sale should not involve an obligation on the part of the vendor that the transferor should equally be and remain willing, so far as he is concerned, that the purchaser should have the benefit of the transfer. Where the stage of registration is concerned the transferor holds the field. The vendor, if not himself the transferor, has no relations with the company, and as against the company has no locus of objection to registration. If the vendor be himself the transferor, cadit quæstio. Everyone is agreed that he must not object to

(1) [1941] 2 K.B. 176, 190.

(2) 20 Q. B. D. 576, 582.

registration. But how is his burden lessened if he completes his contract by tendering a transfer, not by himself, but by someone of whom the purchaser knows nothing except that he is the owner of the contractual number of shares, and with whom the purchaser may have, and in most cases has, no kind of contractual relation except such as may arise from the transfer itself? The transferor may be a nominee of the vendor. He may be a person who has signed a transfer in blank with the object that the vendor may realize the shares for himself. How could business be carried on if the vendor could say: "True, I must not object to registration, but I "offer you a transfer from another owner. On receiving "that transfer with certificate you must pay me, but the "person whose transfer I have given you in performance of "my contract may forthwith do all he can to prevent you "getting the legal right to the shares, and I shall hold on to "the price, leaving you to bring a lawsuit against my "transferor"? My Lords, it seems to me clear that the obligation expressed by Lord Esher in the passage I have cited applies to the seller's transferor as well as to the seller, and, in my opinion, if it became important, applies to him even more rigorously than to the seller, for it is his objection which at that stage counts. I think, therefore, that the true view is that the respondents, who are sellers in this case, did not, as they were bound to do, put the appellants in the position to complete the contract of sale which they had employed the appellants to effect, and that they are obliged to indemnify the appellants against the result of such breach.

For this result I have assumed, in accordance with the first part of this opinion, that the respondents were principals of the appellants in the sale which the appellants made through E. J. Evans & Co. There was nothing proved in this case either in the rules of the Stock Exchange, London, or in the rules of the Bristol Stock Exchange, that the appellants, in the transaction that took place, took the part of being vendors to E. J. Evans & Co. The latter rendered bought and sold notes in the ordinary form expressing the contract to be "broker's contract," but the appellants were clearly, on the Bristol documents, the vendors of the shares and they assumed liability as vendors to E. J. Evans & Co.'s ultimate purchasers. This contract, owing to the respondents' default, they were unable to complete, and the cost of buying substituted stock was the proper measure of damages for that breach, and the true measure of the indemnity which the appellants are entitled to recover.

I have not on this reasoning found it necessary to discuss the London Stock Exchange rules, or the rules of the Bristol Stock Exchange of which no evidence was given. The learned Lord Chief Justice (1) decided the case in favour of the appellants by reference to r. 120, sub-r. 1, of the rules of the London Stock Exchange, which provides : " The seller of "securities is responsible for the genuineness and regularity "of all documents delivered." There is no doubt that the transaction was subject to that rule, and I have little doubt that the decision can be supported on this point, but the sale as effected with E. J. Evans & Co. was, as expressed in their contract note, " subject to the rules of the Stock Exchange." I think that this must mean the rules of the Bristol Stock Exchange, but we have no evidence of what they are. Perhaps I may be pardoned for making the suggestion, founded on some little experience of these matters, that it might be as well if this Bristol contract note in future were to define the Stock Exchange, the rules of which are being incorporated, as is done in the case of London contract notes. As this case can be decided on principles which are not dependent on the incorporation of express rules I prefer to deal with it in that manner. For these reasons I am of opinion that this appeal should be allowed, and the judgment of the Lord Chief Justice in favour of the appellants should be restored. The respondents should pay the costs in the Court of Appeal and in this House.

LORD THANKERTON. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend, Lord Atkin, and in the motion proposed by him. I need add nothing on the question whether the respondents are liable as principals to the appellants, but, as we are differing from the view taken by the Court of Appeal on the question whether the appellants are entitled to be indemnified by the respondents in respect of the loss which they have incurred, I desire to add some observations on that point. In *London Founders Association, Ld.* v. *Clarke*, Lord Esher M.R. states (2): " I do not think that the vendor does undertake that the company "will accept the purchaser so as to make himself responsible for "their refusal to do so. The purchaser takes that risk on

(1) [1941] 2 K. B. 176, 186.

(2) 20 Q. B. D. 576, 582.

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"himself, and the seller's liability is satisfied by handing to "the purchaser the transfer and certificates of the shares in "proper form, and doing nothing either before or sub-"sequently to prevent the registration of the purchaser." That is accepted as a correct statement of the vendor's duty under the contract, but it is incomplete in so far as it does not expressly cover the case where the vendor is not himself the transferor, but tenders a transfer by a third party in fulfilment of his contractual obligation, as was done in the present case. But to me it is clear that the only view on this aspect of the matter that is consistent with Lord Esher's dictum is that, if the vendor chooses to offer to satisfy his obligation by a transfer from a third party, he must take the risk of that transfer not being as satisfactory as a transfer by himself should be because of some action by the third party which has the effect of interfering with registration. In the present case the respondents were given reasonable time to try to remove the difficulty, but they failed to get it removed, and they must stand the consequences of their adoption of the use of a third party's transfer in satisfaction of their contractual obligation.

Lord Russell of Killowen (read by Lord Thankerton). My Lords, a curious feature about this appeal is that, if the case for the appellants rested on a proposition on which it was apparently based in the Court of Appeal, no fault could be found with the judgments in that court in dealing with that proposition. MacKinnon L.J. (after stating the facts) begins his consideration of the legal position with the following observation (1): " The whole basis of this claim rests on the "allegation that it was the duty of the defendants, not merely "to hand over a transfer valid in form with a certificate for "the stock, but also to secure or guarantee that that transfer "would be eventually registered by the company in the name "of the purchaser." du Parcq L.J. and Bennett J. agree with the judgment of MacKinnon L.J. but they also deal with another point of view, and hold that while the respondents were bound to do nothing themselves to prevent the registration of the purchaser, they were under no obligation to see (nor did they guarantee) that the transferor, Miss E. A. Lucas, did nothing to prevent such registration. Again, I am not disposed to quarrel with this statement.

(1) [1941] 2 K. B. 176, 189.

The seller of shares is clearly not liable if, notwithstanding that the seller and transferor are both desirous that the transfer should be registered, the company refuses to register. The seller has fulfilled his contract. It is for the transferee to insist with the company on his right to registration: see *Skinner* v. *City of London Marine Insurance Corporation* (1), and *London Founders Association, Ld.* v. *Clarke* (2). The seller is under a duty to hand over what are called in *Stray* v. *Russell* (3) "genuine transfers and certificates," in *Skinner's* case (1) "a valid transfer," and in the *London Founders* case (2) "the transfer and certificates of the shares in proper "form." What happened in this case was that when the ultimate purchaser, R. J. Fry, having paid his money on settlement day, applied to have the stock registered in his name his application was refused by the Bristol Waterworks Co. in consequence of a notification by Miss E. A. Lucas that her signature to the transfer had been obtained under fraud and compulsion. In those circumstances the appellants did what I think they were both entitled and bound to do. They bought other stock for delivery to R. J. Fry in fulfilment of their obligation to him. It is conceded that, if the appellants were under liability to R. J. Fry, they would be entitled to claim indemnity against the respondents.

The crucial question may now be posed. Did the appellants fulfil their obligation as sellers of the stock to R. J. Fry, by delivering a transfer executed by Miss E. A. Lucas, which she repudiated on the ground of fraud and duress? In my opinion, they did not. Whether the allegation of fraud and duress was true or false seems to me immaterial. The duty of the seller to deliver a transfer as stated in the authorities must, in my opinion, necessarily involve a duty on his part to deliver a transfer executed by a transferor who is, and continues to be, ready and willing that the subject-matter of the transfer shall be duly vested in the person named or to be named as transferee in the transfer. Unless the transferor who is so put forward is and continues so ready and willing, I cannot think that the seller has fulfilled his obligation to hand over a transfer to the purchaser. In this case, therefore, the respondents having failed in that obligation, the appellants found themselves in breach of their obligation to R. J. Fry, and became entitled to be indemnified by the respondents.

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(1) 14 Q. B. D. 882, 887.

(2) 20 Q. B. D. 576, 582.

(3) 1 E. & E. 888, 901.

I agree that the respondents were acting as principals in instructing the appellants. I would allow this appeal and restore the judgment of the Lord Chief Justice.

Lord Wright. My Lords, I agree with the opinion just delivered by my noble and learned friend Lord Atkin and also with the judgment of the Lord Chief Justice. I desire to state very shortly my view on the crucial question before your Lordships, which is one of some importance because it is as to the true construction of a contract for the sale of shares such as that now being considered.

The true issue here is whether the sellers, the appellants, who, I think, sold as principals under the contract though they were acting as agents in a question between them and the respondents, made a good tender of the shares to the buyer whom I shall treat as Mr. R. J. Fry. It is unfortunate that the Court of Appeal do not appear to have directed their attention to that problem. They treated the case as capable of being determined by the simple application of the well established rules laid down in *London Founders Association, Ld.* v. *Clarke* (1), and the earlier authorities to the same effect cited in that decision. That rule is broadly that the seller of shares in the usual way is not responsible for the registration of the shares by the company. That is a matter for the purchaser to secure. But this is only true on the assumption that the transfer tendered in fulfilment of the contract was of a character which has been characterized by various adjectives, clean, valid, genuine, regular, and the like. If the transfer tendered does not satisfy that description, the tender is not good and the seller has not performed his contract. It was on this ground that the Lord Chief Justice decided in favour of the appellants. He held that the appellants were bound under the contract to produce stock which could be registered in the name of the buyer, and had failed to do so. I am not clear whether he so decided as a matter of common law, or only on the footing of r. 120 of the rules of the London Stock Exchange, which applied as between the appellants and the respondents, though they or similar rules are not shown to have applied as between the appellants and E. J. Evans & Co., the Bristol brokers, but I think the same obligation lies on the seller according to the ordinary rules of contract at common law. A seller of shares ought in law

(1) 20 Q. B. D. 576.

to be held bound to tender an unexceptionable transfer. I do not think that the matter would have been open to doubt if the defect in the transfer had been that it was forged or had been obtained from the transferor by fraud or duress or undue influence or any other ground that would have entitled the transferor to claim to treat it as void or voidable. If, when the company in the usual way notified the transferor that a transfer had been lodged and she had been asked if she objected to the transfer, the reply had been that there was an objection of the type I have indicated, it is, I think, clear that the registration of the transfer could not have been made. The directors would be entitled to refuse to register the transfer. In my opinion, a transfer in these circumstances could not be regarded as valid or proper or regular or whatever epithet is chosen. The company concerned in the present case is not a limited company registered under the Companies Act, but a statutory corporation. That distinction is, however, not material so far as concerns the substance of the matter, though it would affect the form of procedure which the buyer might take against the company to secure registration. He could not avail himself of the summary procedure for rectifying the register under the Companies Act, but might proceed under R. S. C., Or. LIII., and apply for a mandamus. If, however, he took either course he might have to assume the burden of proving that the transferor's objection was ill-founded. As the Lord Chief Justice shrewdly observed (1), the transferee might refuse to embark on litigation. He might, in the old phrase, say that he had bought shares, not a law suit. He might prefer to insist on having the shares tendered replaced by other shares which could be registered or on some analogous mode of redress. The same conclusion may be reached on the footing that the seller of shares of which he is not the registered owner who purports to perform his contract by means of a transfer executed by the registered owner undertakes by his contract that the transferor is at all material times ready and willing to transfer and will do nothing to prevent registration, just as a seller who is himself the registered owner is bound, in virtue of his contract, to do nothing to prevent the transfer being registered.

The present case may be regarded as peculiar because of the apparently groundless and irresponsible attitude of the transferor, Miss E. A. Lucas, but her attitude clearly was

(1) [1941] 2 K. B. 176, 180.

that she objected to the validity of the transfer, and, though she admitted that she had signed it, objected that her signature had been obtained by fraud and compulsion. In fact, she repudiated the transfer, and as she adhered to that repudiation the buyer could not get his shares except under the decision of a court. In my opinion, in these circumstances the appellants came under a liability to the buyer to make amends. It is not now disputed that the course which the appellants took to satisfy that liability was proper. It is not now disputed that on the footing of that liability which was incurred by the appellants in the course of their duty as agents employed by the respondents (who it is not now disputed were their principals in the matter), the appellants are entitled to the indemnity which the Lord Chief Justice held they should have. I concur in the motion proposed.

LORD ROMER (read by LORD THANKERTON). My Lords, the appellants, in para. 3 of their statement of claim, after referring to the instructions to sell contained in the letter of April 25, 1939, alleged (inter alia) that by reason of those instructions the respondents (*a*) impliedly warranted and agreed with the appellants that Miss Lucas would do nothing to prevent the Bristol Waterworks Co. registering the purchaser of the 250*l*. stock as the holder thereof, and (*b*) were under the duty to the appellants to take all steps necessary to procure such registration. These allegations were probably the reason for the case taking the course that it did before the Court of Appeal. MacKinnon L.J. held that the appellants were under no such duty as was alleged in sub-para. (*b*). du Parcq L.J. and Bennett J. held that no such warranty or agreement as was alleged in sub-para. (*a*) was to be implied. I respectfully agree with all three of them, but, unfortunately, they omitted to deal with the real question that arises for decision in this case. The question is this. At the time that the appellants purchased the second lot of 250*l*. stock for delivery to R. J. Fry, were they under a legal obligation to E. J. Evans & Co. so to do? If they were, they are entitled to the indemnity from the respondents that they seek to obtain in this action, inasmuch as I am satisfied that the respondents, in giving the instructions of April 25, 1939, did so as principals. In my opinion, the appellants were plainly under the obligation that I have mentioned. I do not think that a seller of stock can be regarded as having completely

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discharged his duty to the purchaser by merely handing over to him a transfer of the stock duly executed by the registered owner together with the certificate. It is, in my view, incumbent on the seller to produce a transfer executed by a registered owner who is at all material times willing that the transferee shall be registered as owner in his place. In the present case the respondents failed to furnish the appellants with any such transfer, and the appellants were, accordingly, unable to discharge the duty that they as vendors owed to E. J. Evans & Co. and the ultimate purchaser. In my opinion, the appeal should be allowed, and I concur in the motion that is before the House.

Appeal allowed.

Solicitors for appellants: *Roney & Co.*
Solicitors for respondents: *Hair & Co.*

[HOUSE OF LORDS.]

SUMMERS . . . . APPELLANT;

AND

SALFORD CORPORATION . . . . . . RESPONDENTS.

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Landlord and tenant—Housing—Repair, maintenance and sanitary condition of houses—Small houses—Obligation of landlord—Implied term in letting that house will "be kept reasonably fit for human "habitation"—Lack of ventilation in a bedroom—Defective sash-cord —Novus actus interveniens—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *s.* 2, *sub-ss.* 1, 4.

By s. 2 of the Housing Act, 1936: "(1.) In any contract for "letting for human habitation a house at a rent not exceeding— "(*a*) in the case of a house situate in the administrative county of "London, 40*l.*; (*b*) in the case of a house situate elsewhere, 26*l.*; "there shall, notwithstanding any stipulation to the contrary, "be implied a condition that the house is at the commencement of "the tenancy, and an undertaking that the house will be kept "by the landlord during the tenancy, in all respects reasonably "fit for human habitation . . . . (3.) In this section . . . the "expression 'house' includes part of a house."

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* *Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

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The appellant was the tenant of a four-roomed house to which the provisions of s. 2, sub-s. 1, of the Act applied. In February, 1940, a sash-cord of the only window in one of the two bedrooms broke and the window jammed. The appellant gave notice of this to the rent collector of the respondents, the landlords, but it was not repaired. On April 30, 1940, while the appellant was cleaning the window, the other sash-cord broke, her hand was caught between the two parts of the window, and she was injured. The appellant brought an action against the respondents claiming damages for personal injury due to a breach by the respondents of the term to be implied under the statute in the contract for letting the house:—

Held, that the jamming of a bedroom window so that it could not be moved without danger impaired the ventilation of the room; that, in the case of a small house such as that occupied by the appellant, this interfered with its ordinary user so as to involve a breach of the implied undertaking to keep it "in all "respects fit for human habitation"; and that, therefore, the appellant was entitled to succeed.

Per Lord Wright. The conduct of the appellant in opening and cleaning the window was not novus actus interveniens which broke the chain of causation between the respondents' default and the appellant's injury so as to prevent her being successful in the action.

Dictum of Atkin L.J., in *Morgan* v. *Liverpool Corporation* [1927] 2 K. B. 131, 145, approved.

Decision of Court of Appeal [1941] 2 K. B. 218 reversed.

APPEAL from the Court of Appeal.

The facts were stated by Lord Atkin as follows: The appellant, a woman aged about sixty-four, had been for thirty-four years the tenant of a house in Salford, No. 23 King Edward Street, at a rent of 10*s.* a week—a house, therefore, to which the provisions of s. 2, sub-s. 1, of the Housing Act, 1936, applied. It was an old house of two stories with two rooms back and front on the ground floor, and two bedrooms back and front on the first floor. It did not appear of what the household consisted, but the front bedroom was occupied by an invalid daughter of the appellant. In February, 1940, one of the sash-cords of the top sash in the only window in the front room broke, and the appellant gave notice of this to the respondents' rent collector who was the person authorized to receive complaints of lack of repair. Nothing was done. The window jammed when it was moved, but it was capable of being opened to some extent. On April 3, 1940, the appellant was cleaning the window and drew it down a few inches. She placed her hand on the top of the lower sash when, as she was cleaning the upper sash, the second cord broke and the upper sash fell, crushing her left hand as well as her right between the two sashes. She was thus imprisoned for twenty to thirty minutes before she was released. Both hands were lacerated, and the left hand had to receive eight stitches. She lost the use of her left hand, and her general health suffered seriously. The appellant brought an action against the respondents, claiming damages for breach of the undertaking implied in the contract of letting by virtue of s. 2, sub-s. 1, of the Housing Act, 1936, that the house would "be kept by the landlord "during the tenancy, in all respects reasonably fit for human "habitation." Croom-Johnson J. at Manchester Assizes found that the facts did not disclose a breach of the undertaking, but he assessed the damages at 260*l.*, in the event of liability being established. The Court of Appeal, by a majority (MacKinnon L.J. and Stable J., Luxmoore L.J. dissenting), affirmed the decision of Croom-Johnson J. The appellant appealed to the House of Lords. There was no appeal against the amount of the damages assessed by the judge.

Laski K.C. and *C. Cowan* (for *N. Lever*, on war service) for the appellant. The house was not kept by the respondents during the tenancy "in all respects reasonably fit for human "habitation" in accordance with s. 2, sub-s. 1, of the Act. Owing to the broken sash-cord the only window in one of the bedrooms of this small house was in a condition dangerous to the appellant, should she move it, and this constituted a state of disrepair contrary to the undertaking implied by the sub-section. Legislation has been moving steadily towards a more strict standard in housing. The standards have altered from decade to decade, and the changes are reflected in the successive Housing Acts: Labouring Classes Lodging Houses Act, 1851; Labouring Classes Dwelling Houses Act, 1866; Labouring Classes Dwelling Houses Act, 1867; Artizans and Labourers Dwellings Act, 1868, in s. 5 of which occurs the phrase "in a condition or state dangerous to health so as to "be unfit for human habitation"; Artizans and Labourers Dwellings Improvement Act, 1875, the preamble of which refers to houses "unfit for human habitation"; Artizans and Labourers Dwellings Act (1868) Amendment Act, 1879; Artizans Dwellings Act, 1882, s. 8 of which provides for the demolition of houses, otherwise fit, which prevent the proper ventilation of other houses; Housing of the Working Classes Act, 1885,

s. 12 of which uses for the first time the phrase "in all respects "reasonably fit for human habitation"; Housing of the Working Classes Act, 1890, ss. 6 and 38 of which provide for improvements in ventilation and s. 75 uses the phrase "in all "respects reasonably fit for human habitation"; Housing of the Working Classes Act, 1903, s. 12 of which provides that the Act of 1890 shall apply "notwithstanding any agreement to the contrary"; Housing, Town Planning, etc., Act, 1909, s. 15 of which provides for an implied undertaking by the landlord to keep the house "in all respects reasonably "fit for human habitation"; Housing Act, 1923; Housing Act, 1925, s. 1 of which provides for a similar implied undertaking; Housing Act, 1930, s. 62, sub-s. 3; Housing Act, 1936, s. 2, s. 188, sub-s. 1, which defines "sanitary defects" as including lack of ventilation, darkness and dampness, and s. 188, sub-s. 4, under which regard is to be had to the general standard of housing accommodation for the working classes in the district. This legislation has modified the common law rule that there is no implied covenant on the part of the lessor of a house that it is reasonably fit for human habitation: *Smith* v. *Marrable* (1); *Hall* v. *Manchester Corporation* (2); *Dunster* v. *Hollis* (3); *Stanton* v. *Southwick* (4); *Morgan* v. *Liverpool Corporation* (5). By current standards lack of ventilation renders a house unfit for human habitation: s. 188, sub-s. 1, of the Act of 1936; and, in the case of a house of this size, a defect preventing the proper ventilation of one bedroom would render the house as a whole unfit. In any event, by s. 2, sub-s. 3, of the Act the expression "house" includes part of a house. This was not a latent defect and notice had been given to the respondents who had a chance of making the house reasonably fit for human habitation.

Cowan, following. If this house had been constructed with a fixed window in the bedroom it would not have been fit for human habitation, and as a result of the breaking of the sash-cord this window became virtually fixed, since it could not be moved without danger. The standard of fitness has been left by the law in an elastic form depending on the particular house. This was a small house which was generally affected by the defect.

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(1) (1843) 11 M. & W. 5.

(2) (1915) 84 L. J.(Ch.) 732, 738, 743, 747.

(3) [1918] 2 K. B. 795.

(4) [1920] 2 K. B. 642.

(5) [1927] 2 K. B. 131, 145.

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H. Edmunds for the respondents. On the true construction of the Act one can only look at a house as a whole to see whether it is reasonably fit for human habitation. The provision in s. 2, sub-s. 1, would be meaningless if one had to look at every item in it. "Fit for human habitation" is not a term of art, but it is meant to be construed as an ordinary member of the public would construe it. If a house were in perfect condition save that one sash-cord was broken the ordinary man would regard it as ridiculous to say that it was not reasonably fit for human habitation: *Morgan* v. *Liverpool Corporation* (1). If the appellant's contention were right, a tenant who by carelessness allowed a lavatory to become stopped up would be entitled to call on his landlord to make it good. A house is not unfit for human habitation if there is in it a small defect which the tenant could easily remedy. In the present case there is no evidence that the defect caused inadequate ventilation. Its consequences were too slight to bring it within the undertaking implied by the statute, for, at the highest, they were a small inconvenience and the risk was very remote that if someone interfered with the sash the second cord might break causing injury or damage. The standard of human needs is not the same as the standard of human desires and there is very little in this world that is so safely arranged that a human being cannot injure himself with it. In considering whether this defect rendered the house unfit for human habitation one must look, not at the possibility, but at the degree of probability, of injury. A splinter in a floor may poison the hand of a woman scrubbing it and kill her, but it will not render the house unfit for human habitation. Further, s. 2, sub-s. 1, does not impose any statutory duty owed to the state. It merely adds a covenant to an ordinary common law contract. While a tenant cannot abrogate his rights under that covenant, he is never bound to enforce them, and, accordingly, notice by him requiring repair is a necessary preliminary to any obligation on the part of the landlord to repair, even if he knows of the defect. In the present case there is no evidence of any notice requiring the respondents to repair the defect that caused the accident, for the window could not fall until the second cord broke; it could not break unless it was defective, and, as no one knew it was defective, no notice could be given: see *Murphy* v. *Hurly* (2). If a landlord having had notice of a defect fails to remedy it within a reasonable time he is liable for any consequences, but the respondents, although they had been told about the broken cord, had not been apprised of any defect in the other cord. In any event, the damage was too remote. The words of the Act do not make the landlord generally liable for the tenant's safety. He is only liable when the damage is the proximate result of his breach of contract. The appellant, though belonging to the labouring class, is in no different position from any other person. She knew everything the respondents knew about the state of the cord, since she was their sole source of information. She might either have had the repairs done herself and charged the cost to the respondents or left the window alone and sued them for breach of contract. Instead, of her own free will, she tried to move the window and was injured. Her action, therefore, was novus actus interveniens, breaking the chain of causation between the respondents' default and her injury: see *S.S. Singleton Abbey* (*Owners*) v. *S.S. Paludina* (*Owners*) (1).

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(1) [1927] 2 K. B. 131, 145.

(2) [1922] 1 A. C. 369.

Laski K.C. in reply. The damage was a direct, and, in a sense, the inevitable, consequence of the state of the window. Since the window existed for the purpose of ventilation there is no need of any evidence of lack of ventilation.

The House took time for consideration.

1942. Dec. 4. LORD ATKIN. My Lords, the case raised what is an important question to owners and tenants of houses to which the Housing Act, 1936, applies, namely, the meaning and extent of the phrase "keep in all respects reasonably "fit for human habitation." The test of the obligation cannot simply be whether, with the disrepair complained of, the tenant can live in the house. The present war has shown how ineffectual such a test may be. It must not be measured by the magnitude of the repairs required. A burst or leaking pipe, a displaced slate or tile, a stopped drain, a rotten stair tread, may each of them until repair make a house unfit to live in, though each of them may be quickly and cheaply repaired. I find myself in complete agreement with the judgment of Luxmoore L.J. in the Court of Appeal, and perhaps all the more so because he relies (2) on a dissenting judgment of my own in a similar case, *Morgan* v. *Liverpool Corporation* (3), which, I am glad to think, also appears to have the approval of my noble and learned friends in the present case. I will only cite one passage from my own judgment in *Morgan's* case (1), because I know no better way of expressing my present opinion after a lapse of fifteen years (2): "If the state of repair "of a house is such that by ordinary user damage may naturally "be caused to the occupier, either in respect of personal injury "to life or limb or injury to health, then the house is not in all "respects reasonably fit for human habitation." In the present case the breaking of one sash-cord necessarily involved the strong probability that its fellow cord, especially with the extra strain imposed on it, would also break, with the further certainty of danger to anyone handling the window at the time of the break and with the further certainty that until repair that window must either remain permanently closed or permanently open. Either event would prevent that room from being reasonably fit for occupation, and, as this room was one of only two bedrooms, it appears to me clear that until repair the whole house would properly be described as unfit for occupation by a working class family. I accept the view that, notwithstanding the provisions in s. 2, sub-s. 3, of the Housing Act, 1936, that "the expression 'house' includes part of a "house," disrepair to a single room will not be sufficient unless the effect of it is to render the whole house not "reasonably "fit for human habitation," but I should suppose that in houses to which the Act applies it would be difficult to confine the effects to one room alone.

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(1) [1927] A. C. 16, 25, 32.

(2) [1941] 2 K. B. 218, 224, 225.

(3) [1927] 2 K. B. 131.

I wish to add that, since the argument, I have looked at the decision in *Proudfoot* v. *Hart* (3), a leading case on repairing covenants, and there I find a reference in Lord Esher's judgment to a definition by Alderson B. in *Belcher* v. *M'Intosh* (4) of "habitable repair." "It was difficult to suggest any material "difference between the term 'habitable repair' used in this "agreement, and the more common expression 'tenantable "'repair': they must both import such a state, as to repair, "that the premises might be used and dwelt in not only with "safety, but with reasonable comfort, by the class of persons "by whom, and for the sort of purposes for which, they were "to be occupied." "That is the whole definition," says Lord Esher, "and, so far as it goes, it is a good one." I agree, and I am bound to say that I find it difficult to draw a distinction between an obligation to put premises into habitable repair and so deliver them up, and to keep premises "in all "respects reasonably fit for human habitation." Too much emphasis should not be laid on "comfort," but, taking a reasonable view of the meaning of "comfort" in the definition, it affords a useful test of liability. It is, perhaps, to be regretted that neither in *Morgan's* case (1) nor in the present were *Belcher* v. *M'Intosh* (2) or *Proudfoot* v. *Hart* (3) cited. I entertain no doubt that the damage to the appellant was the direct consequence of the respondents' breach of their repairing obligation. She was engaged in a normal use of the house in respect of which there had been a failure to repair.

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(1) [1927] 2 K. B. 131.
(2) Ibid. 145.
(3) (1890) 25 Q. B. D. 42, 50, 51.
(4) (1839) 2 M. & Rob. 186, 189.

In the present case the point on which the Court of Appeal in *Morgan's* case (1) decided for the defendant does not arise, namely, that notice of the lack of repair complained of must be given to the landlord before his statutory obligation arises. I can see that different considerations may arise in the case of an obligation to repair imposed in the public interest, and I think that this question must be left open, and I reserve to myself the right to reconsider my former decision if the necessity arises. In the result, the judgments of Croom-Johnson J. and of the Court of Appeal should be set aside, and judgment entered for the appellant for 260*l.* with costs. The appellant should have the ordinary costs in the Court of Appeal up to the time when the order permitting her to proceed in forma pauperis was made. After that date she should have such costs in the Court of Appeal and in this House as are appropriate to appeals proceeding in forma pauperis.

LORD THANKERTON. My Lords, I have had the opportunity of considering the opinion which has just been delivered by my noble and learned friend, and I agree with it entirely. I also desire to reserve the question whether the decision of the Court of Appeal in *Morgan's* case (1) as to the necessity of notice of the lack of repair is correct or not.

LORD RUSSELL OF KILLOWEN (read by LORD ROMER). My Lords, I also am of opinion that this appeal should be allowed. One is rather inclined to associate the idea of a house being unfit for human habitation with its being in such a

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(1) [1927] 2 K. B. 131.
(2) 2 M. & Rob. 186, 189.
(3) (1890) 25 Q. B. D. 42.

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condition, structurally or otherwise, as to call for demolition under the relevant provisions of the Housing Acts, and at the first blush it seemed to me difficult to say that the existence of a broken sash-cord in the window of one of the four rooms of the appellant's house caused the house not to be "in all respects "reasonably fit for human habitation," but a closer consideration has convinced me that the respondents have committed a breach of the undertaking imposed on them by s. 2 of the Housing Act, 1936. One sash-cord had been worn to breaking point and had in fact snapped a month or more before the appellant's accident. The sash-cord on the other side would normally be, and in fact was, in a precarious condition. The result of such a state of affairs was that the window could not be put to its normal use, namely, being opened and shut for the purpose of ventilation or cleaning, without danger to the operator. I agree with the view expressed by Luxmoore L.J. in the following words (1): " The usual method of providing "ventilation for a room in a dwelling house is by a window or "windows, which is, or are, so constructed as to open or shut "without danger to the person opening or shutting it or them. "If a room, especially a bedroom, has only one window and "that window cannot be opened or shut without danger to the "person seeking to perform that operation, that room may, "in my opinion, be said to be not fit for human habitation." The lord justice confines his observations to danger in opening and shutting the window for the purpose of ventilation. I would add, as a further consideration, the danger of opening the window for the purpose of cleaning it. Opening it for such a purpose would be such an ordinary user as was contemplated by Atkin L.J. when, in that part of his judgment in *Morgan* v. *Liverpool Corporation* (2), which dissented from his colleagues, he used the following language: "If the state of repair of a "house is such that by ordinary user damage may naturally "be caused to the occupier, either in respect of personal "injury to life or limb or injury to health, then the "house is not in all respects reasonably fit for human "habitation."

I would only add that I feel no doubt that the damage sustained by the appellant was a direct result of the landlord's breach, and that I desire to keep open the question whether *Morgan's* case (2) was rightly decided. The question whether giving notice to the landlord is a condition precedent to his

(1) [1941] 2 K. B. 218, 223. (2) [1927] 2 K. B. 131, 145.

liability does not arise in the present case. I concur in the motion proposed.

LORD WRIGHT. My Lords, I agree with the opinion which my noble and learned friend Lord Atkin has just delivered. I agree also with the dissenting judgment of Luxmoore L.J. in the Court of Appeal. I should not think it necessary to add observations of my own, were it not that the case involves the construction of an important legislative provision passed for the benefit and protection of the poorer classes of the community and not hitherto brought up for the consideration of this House.

The claim is based on s. 2, sub-s. 1, of the Housing Act, 1936, which is the latest embodiment of a legislative measure going back to 1857. The sub-section provides that in any contract for letting for human habitation a house at a rent not exceeding 26*l.* a year (I take the figure which applies in Salford) there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house shall be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation. The section also gives to the landlord power to enter any premises to which the section applies to view their state and condition. I am tempted to ask at the outset whether a house like that in question, an old house with four rooms, two on the ground floor and two on the first floor, is in all respects fit for human habitation if, in one of the two bedrooms, the tenant cannot clean the only window in the room without sustaining the injuries which affected the appellant. The most elementary needs of comfort and sanitation require that windows should be opened and shut. In a place like Salford windows in a poor neighbourhood must be cleaned from time to time if people are to live in the rooms at all. These elementary needs must, in my opinion, be capable of being satisfied if a house is to be regarded as fit in every respect for human habitation. But for the discussion in some earlier cases, and but for the difference of opinion in the present case in which the judge and the majority of the Court of Appeal held that the action failed on the ground that there was no breach of the statutory condition, I might have been tempted to regard this as a plain case. I must, however, consider the conflicting views in the courts below.

On the one hand, MacKinnon L.J. said (1) he was unable to hold that a failure to put right one broken sash-rope could be treated as a breach of the statutory obligation, and Stable J. (2) thought it was too trifling a disrepair. It is not, however, the amount, but the consequence, of the disrepair which determines whether a room is fit for human habitation. In the same way it is not the smallness of a defect—a flaw in a rod, a crack in a pipe, the maladjustment of a valve—which determines whether it constitutes a breach of the warranty of seaworthiness in the case of a ship. Luxmoore L.J., however, was of opinion that (3) "If a room, especially a bedroom, has "only one window and that window cannot be opened or shut "without danger to the person seeking to perform that "operation, that room may, in my opinion, be said to be not "fit for human habitation." The sub-section must, I think, be construed with due regard to its apparent object, and to the character of the legislation to which it belongs. The provision was to reduce the evils of bad housing accommodation and to protect working people by a compulsory provision, out of which they cannot contract, against accepting improper conditions. Its scheme is analogous to that of the Factory Acts. It is a measure aimed at social amelioration, no doubt in a small and limited way. It must be construed so as to give proper effect to that object. The section only applies to low-rented tenements. In these small houses it may be assumed that every room is in full use, and I think that the statutory condition is intended to ensure that every room is fit for use. It was contended that it is the house, and not every room in the house, which is required to fulfil the condition, but, in my opinion, that contention is inconsistent both with the language and the object of the section. "In all respects" must mean in all respects material to the enjoyment of the tenement, and the unfitness of one room may be a most material detraction from that enjoyment. "Human habitation" is in contrast with habitation by pigs, horses or other animals, or with use as warehouses and the like, but I think it also imports some reference to what we call humanity or humaneness. MacKinnon L.J. observed (1) that the words used are not words of art taken from the usual provisions of covenants in leases, and described them as "words almost of journalistic "generality." But that is natural enough. The measure is

(1) [1941] 2 K. B. 218, 221.
(2) Ibid. 226.
(3) Ibid. 223.

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a new departure. The construction of usual covenants in leases has often been justified, whether rightly or wrongly, on the ground that the words have acquired a recognized and conventional meaning, but here the condition is not derived from the agreement of the parties. It is imposed compulsorily by Parliament. Older cases, however, have used similar words. Thus in *Smith* v. *Marrable* (1), the well-known case of a furnished house, the side note describes the implied condition to be that it is "reasonably fit for habitation." The phrase used by Parke B. was (2) "fit for decent and comfortable "habitation." The words of the Act are meant to be wide and elastic, because they are to be applied to the needs and circumstances of poor people living in confined quarters. The court has to condescend to realize what these are.

Certain authorities were cited. I shall content myself with referring to two. In *Morgan* v. *Liverpool Corporation* (3), the case turned on the provisions of the Housing Act, 1925, which was the Act then in force. These provisions were identical for this purpose with those of the Act of 1936. The tenant there was injured through the breaking of a window sash-cord. The case was decided against the tenant on the ground that the landlord had not received notice of the defect, but the general effect of the statutory condition was discussed, though only by way of obiter dicta. The appeal was from Sir Francis Taylor K.C., the very experienced judge of the Court of Passage in Liverpool, who had held that the disrepair of the window cord involved a breach of the statutory condition. Atkin L.J., in commenting on that decision, said that he was not satisfied that the conclusion was wrong. "No one," he observed (4) "would say that the mere fact that one cord, or "two cords for that matter, were broken, necessarily put a "house in a state in which it is unfit for human habitation, "yet," he went on, "when you take into consideration the class "of house and the people with whom you are dealing and the "particular circumstances of the case, you may be forced to a "different conclusion. The standard which was suggested by "Mr. Batt in his argument is one which commends itself to me, "which is that if the state of repair of a house is such that by "ordinary user damage may naturally be caused to the occupier "either in respect to personal injury to life and limb or injury to "health, then the house is not in all respects reasonably fit for

(1) 11 M. & W. 5.
(2) Ibid. 7.
(3) [1927] 2 K. B. 131.
(4) Ibid. 145.

"human habitation." I think these are wise words which give the true test in interpreting a remedial enactment like that in question, intended, as it is, to safeguard humble and poor people against evils which they are themselves less capable of avoiding. "Reasonably" imports reference to an appropriate standard. Nor, as I have indicated, must the condition be construed in the same way as conditions in ordinary cases in the law of landlord and tenant. Lord Hanworth M.R. and Lawrence L.J. took a different view from that of Atkin L.J. Lawrence L.J. (1) thought it fantastic to say that, because one room was rendered less comfortable by the fact that the window cord was broken, the house was not in all respects fit for human habitation. He referred to the defect as "a "slight want of repair." That it was slight in one sense may be true, but to repair it was a skilled joiner's job. But the real question is how it affects the tenant's reasonable enjoyment of the premises.

There may be difficult cases in which the line of division is not easy to draw, but I think that this is a clear case. I should have thought the same of *Stanton* v. *Southwick* (2). The house there was overrun by rats which came up from a hole in a sewer. The county court judge held that it was unfit for human habitation within the meaning of the statutory condition. A Divisional Court set aside his finding as wrong in law. The house, the court held, would have been unfit if it had been found to be infested by rats, but, as the rats did not live and breed there but came up from the sewer outside, the position was different. When I try to put myself in the position of the tenant of that house, I cannot do other than agree with the county court judge. Once the scope and meaning of the section are realized, these cases are seen to turn each on its particular circumstances. The definitions in the Act do not seem to me to give any real assistance.

The appellant in this case was held to have given due notice of the disrepair to the respondents' agent. It is not, therefore, necessary to consider whether the statutory obligation to provide and keep the premises fit, which is absolute in terms, is subject to an unexpressed condition that the tenant must give notice of the defect before he can complain of damage from it. I merely wish to say here that, if the question were to come before me, I should desire to give it careful consideration. It is open in this House.

(1) [1927] 2 K. B. 131, 152.

(2) [1920] 2 K. B. 642.

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But it has been further contended that, in any case, the appellant cannot recover here because it is said (as I understand it) that if she had not been opening or cleaning the window, her hand would not have been injured. It is said that her conduct was novus actus interveniens, which broke the chain of causation between the respondents' default and the appellant's hurt. I do not criticize the Latin phrase or the mechanical metaphor, because both have been regularly used by the highest authorities, nor do I wish here to seek to exhaust the discussions which have centred round these and similar phrases. Whatever refinements may be imagined, I take it to be clear that, if a plaintiff suffers damage by the defendant's default, the damage may be directly due to that default and recoverable even though the accident and damage would not have happened but for some action of the plaintiff, so long as his action was in the ordinary course of things and, at least generally speaking, was not blameworthy. The same may be true of the action of a third party. The plaintiff's damage may still be the direct and natural consequence of the defendant's default, notwithstanding the co-operation of human conduct, whether of the plaintiff or of a third party. Such action may be said to be in the ordinary course of things. As Lindley L.J. observed in *The City of Lincoln* (1): "So far as "I can see my way to any definite proposition I should say "that the ordinary course of things does not exclude all "human conduct, but includes at least the reasonable conduct "of those who have sustained the damage, and" he adds, "who are seeking to save further loss," but I think the general proposition is not necessarily subject to that qualification. The proposition which I have stated does, indeed, ignore refinements which may be considered in the authorities, as, for instance, in *S.S. Singleton Abbey* (*Owners*) v. *S.S. Paludina* (*Owners*) (2), but I think it is sound so far as it goes and is sufficient for the decision of this appeal. The negligent motorist cannot escape liability for injuring a pedestrian merely by pointing out that, if the pedestrian had stayed at home and not ventured out into the streets, he would not have been injured. The co-operation of his deliberate conduct was indeed necessary if the accident was to happen, but his conduct, though deliberate, was legitimate, reasonable and free from blame. In the same way, the appellant's conduct in opening and cleaning the window was lawful, reasonable and free from blame. It was in the ordinary course of things. She was doing what any intelligent observer, knowing exactly how she was circumstanced, would have expected her to do. Her injury was thus the direct and natural consequence of the respondent's default. In my opinion, the appeal should be allowed.

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(1) (1889) 15 P. D. 15, 18.

(2) [1927] A. C. 16.

LORD ROMER. My Lords, the first and most important question which emerges for determination is this: On April 3, 1940, when the appellant sustained the injury to her hands, was the house, No. 23 King Edward Street, "in all "respects reasonably fit for human habitation" within the meaning of s. 2, sub-s. 1, of the Housing Act, 1936? The true scope and effect of these words must necessarily depend on the context in which they are found. In a statute that empowers a local authority to make a demolition order in respect of premises that are "unfit for human habitation" it is plain that there must be a serious degree of unfitness before such an order can be made. It would be ridiculous to suppose that the existence of a broken sash-cord, or of many broken sash-cords, in a house could of itself justify an order for the demolition of the building, but s. 2 of the Housing Act, 1936, is not an enactment designed for the purpose of clearing slum areas but is, as I read it, a provision designed for the purpose of compelling landlords of small dwellings such as are normally inhabited by the working classes to see that their tenants are properly and decently housed. That this is so appears clearly from the heading of that part of the Act in which s. 2 is found. It is in these words: "Provisions for securing the "repair, maintenance and sanitary condition of houses." The word "sanitary" is of importance in connexion with the present case, for by s. 188, sub-s. 1, "sanitary defects" are stated to include, among other things, lack of ventilation and darkness and dampness. It is, therefore, legitimate and proper to treat s. 2, sub-s. 1, of the Act as imposing on the landlord a duty to keep the house in all respects in such a condition that it can be reasonably ventilated. It equally imposes on him the duty of seeing that the house does not get too much ventilation or get in a damp condition by the impossibility of keeping the windows closed when necessary, and that the rooms of the house do not in course of time become too dark for comfort by reason that the windows cannot be cleaned. If the windows in a room cannot be opened or shut or cleaned, that room is not, in my opinion, reasonably fit for human habitation. It is even more unfit for human habitation if the occupant of the house can only open or shut or clean the windows at the risk of serious injury to himself, and, if the room forms a substantial part of the house, it must be held that the house as a whole is not "in all respects "reasonably fit for human habitation."

Turning to the facts of the present case, the first result of the breaking of the sash-cord was that the top part of the window jammed in its frame. The next and inevitable result was that the moment that the window was freed from the jam, the whole of its weight was thrown on the other sash-cord. The third and very probable result was that this other sash-cord also gave way under the strain, and that the upper window fell down. The position, therefore, after the breaking of the first sash-cord was that, if and so long as the landlords continued their policy of masterly inactivity, either the top window in the front bedroom would have to remain permanently closed and remain permanently and increasingly darkened with dirt, or, if an attempt were to be made to open it for the purpose of ventilation or to clean it, the attempt could only be made at the risk of serious bodily injury to the person making it. Even if that person were fortunate enough to escape injury, the window would remain permanently open at the top, giving the rain and snow and fogs of Salford uninterrupted access to the room. My Lords, in view of this condition of affairs in one of the only two bedrooms in the house, I am satisfied that the house was not, on April 3, 1940, "in all respects reasonably "fit for human habitation." This was the view taken by Luxmoore L.J. in the Court of Appeal, and I respectfully agree with him.

The attention of your Lordships was quite properly drawn to the decision of the Court of Appeal in *Morgan* v. *Liverpool Corporation* (1). That case arose under s. 1, sub-s. 1, of the Housing Act, 1925, a sub-section that was in the precise words of s. 2, sub-s. 1, of the Housing Act, 1936. It was there held that before a landlord could be made liable for his omission to keep a house reasonably fit for human occupation it was necessary that he should have been given notice of the defects that constituted the alleged unfitness. In the present case such notice was in fact given on two occasions. The question whether *Morgan's* case (1) was rightly decided does not

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therefore arise on the present appeal, and, accordingly, I express no opinion on it. I would only add that the observations made in that case by the Court of Appeal on the merits were in the circumstances merely obiter dicta, but I prefer those of Atkin L.J., as he then was, to those made by his learned colleagues. For the reasons I have given, I am of opinion that this appeal should be allowed and I agree with the motion now before the House.

Appeal allowed.

Solicitors for appellant: *J. H. Milner & Son, for Leslie M. Lever & Co., Manchester.*

Solicitors for respondents: *L. Bingham & Co., for James Chapman & Co., Manchester.*

LARCHBANK (OWNERS) . . . . . . APPELLANTS;

AND

BRITISH PETROL (OWNERS) . . . . RESPONDENTS.

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Shipping—Collision—Vessels in convoy—No fog signals—Admiralty directions—"Emergency."

The *Larchbank* was under orders to join a convoy and take station astern of the *British Petrol,* the last vessel in one of the columns. They sighted each other at a distance of about a mile, the *Larchbank* then being on the port bow of the *British Petrol,* and exchanged signals, each knowing what was the duty of the other. The *Larchbank* put her wheel hard-a-starboard and her engines full speed ahead and proceeded towards the *British Petrol* which maintained her course at the convoy speed of eight knots. A fog then came down reducing the visibility to about a ship's length. When the vessels next sighted each other the *Larchbank* was virtually across the stem of the *British Petrol* at about a right angle and a collision occurred. Neither ship had sounded fog signals, the *British Petrol* not doing so because Admiralty directions were that the use of whistles or sirens in a fog by ships in convoy was undesirable and that they should not be sounded "except in "emergency or on hearing another ship approaching, when the "master must use his discretion." In a collision action brought by the owners of the *British Petrol* against the owners of the

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**Present*: VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD WRIGHT, and LORD PORTER.

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Larchbank, the assessors took the view that, as a question of seamanship apart from the Admiralty directions, the *British Petrol* should have sounded fog signals:—

Held, that an "emergency" had arisen, not by reason of the mere fact of the fog, but because the master of the *British Petrol* had good reason to think that the *Larchbank* might be approaching, even though he could not hear her, and that, accordingly, he should have sounded fog signals.

Decision of the Court of Appeal [1942] P. 69 reversed, and decision of Bucknill J. restored.

APPEAL from the Court of Appeal.

The facts were stated by VISCOUNT SIMON L.C. as follows. At about 9.25 P.M. on April 24, 1940, a collision occurred in the Irish Sea between the motor-vessel *Larchbank* and the motor-vessel *British Petrol*. The *British Petrol* was the third and last ship in the starboard column of a group of some five ships sailing in two columns from the Clyde to join up with a large convoy. The two columns were separated by about six cables and the ships in the same column were about four cables apart. At the material time, the group of ships, including the *British Petrol*, were on a course of 144° true and were making about eight knots through the water. The *Larchbank*, sailing from Belfast was under orders to join these other ships at a rendezvous in the Irish Sea and to take station astern of the *British Petrol*. The two vessels sighted each other at a distance of about a mile, the *Larchbank* then being three to four points on the port bow of the other vessel. The *Larchbank* put her wheel hard-a-starboard and her engines at full speed, but immediately afterwards a dense fog descended. Both vessels continued on their courses, neither vessel sounding any fog signals, but the *British Petrol* exhibited a cluster light at her stern, manifestly to assist the *Larchbank* to find her proper station. The two vessels suddenly saw one another through the fog at a distance of about a ship's length from each other. The *Larchbank* was then crossing the stem of the *British Petrol* at about right angles. It was impossible to avoid collision, and the *British Petrol* crashed into the starboard side of the *Larchbank* about amidships, both vessels being damaged. In a collision action brought by the respondents, the owners of the *British Petrol*, against the appellants, the owners of the *Larchbank*, Bucknill J., who was assisted by an Elder Brother of Trinity House, decided that both vessels were to blame, and he attributed the fault to the extent of three-quarters to the *Larchbank* and as to the remaining one-quarter to the *British Petrol*. The Court of Appeal (MacKinnon and du Parcq L.JJ. and Lewis J.), which was also assisted by nautical assessors, varied this decision and found that the *Larchbank* was solely to blame. The appellants appealed to the House of Lords. They did not dispute that there was fault on the part of the *Larchbank* or that the distribution of fault, if both ships are to blame, should be as decreed by the trial judge, but they contended that the *British Petrol* was also to blame for the collision.

Hayward K.C. and *Porges* for the appellants.
Carpmael K.C. and *Owen Bateson* for the respondents.

The hearing was in camera, and the House took time for consideration.

1942. Dec. 4. VISCOUNT SIMON L.C. My Lords, the only matter which comes before the House to decide is whether the *British Petrol* is to blame for the collision as well as the *Larchbank*. If the Regulations for Preventing Collisions at Sea applied without qualification to the ships concerned in this disaster, it is obvious that the *British Petrol* would have to share the blame, for she never reduced her speed, but was moving at eight knots through a dense fog, and she never sounded any fog signals. But by reg. 43 of the Defence (General) Regulations, 1939, the Admiralty is empowered to make navigation orders, non-compliance with which involves an offence of which the master should be deemed guilty. Moreover, by s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, such orders "shall have effect notwith-"standing anything inconsistent therewith contained in any "enactment other than this Act." In exercise of these powers, the Admiralty has made the Navigation Order, No. 1, 1939 (St. R. & O., 1939, No. 1157), requiring British merchant vessels to comply with instructions issued to them by the Admiralty, and, as regards the sounding of signals in fog, the Admiralty directions are that the use of whistles or sirens in a fog by ships in convoy is undesirable and that "they should not "be sounded except in emergency or on hearing another ship "approaching, when the master must use his discretion." Another Admiralty direction is to the effect that vessels in convoy are to maintain the specified convoy speed in fog. Although this group of ships had not joined the main convoy,

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it is not disputed that the Admiralty directions just quoted applied to them. Bucknill J. took the view that an "emergency" had arisen so far as the *British Petrol* was concerned with relation to the *Larchbank*, and that the *British Petrol* ought to have sounded a fog signal. The learned judge pointed out (1) that the *British Petrol* "had got into a very "dense fog. She was proceeding at a high speed, a speed "which, but for the Admiralty instructions, would have "been greatly in excess of what was moderate in that weather. "She knew that a vessel was approaching her with the intention "of coming in under her stern to join the convoy. She did "not know the precise position of that vessel. She heard "no signal from her, and she did not know what she was "doing, whether she was doing what she ought to do—edge "away—or whether she was edging towards her." The members of the Court of Appeal took a different view, holding that there was no "emergency" at all, as the master of the *British Petrol* was entitled to assume that the *Larchbank* would edge away, and that, therefore, there was no occasion to use his discretion as to sounding a fog signal. MacKinnon L.J. pointed out (2), truly enough, that fog, even dense fog, cannot constitute an emergency within the meaning of the Admiralty direction. He defined "emergency" in this connexion as "the sudden occurrence of facts causing an "apprehension of danger or difficulty." He thought (3) the material question was one purely of law, namely, the proper meaning of "emergency," and not of the art of navigation, and, on that ground, he held that the views and advice of nautical assessors were irrelevant, although, if the correct view were that there was an "emergency" and the question then arose as to the proper use of the master's discretion, he agreed that expert advice would be very pertinent. The other members of the court concurred.

With all respect to the Court of Appeal, I am unable to accept this view, and I do not find in their judgments any sufficient justification for rejecting the conclusion reached by Bucknill J. What constituted the "emergency" in the present case was, not the fog, but the fact that the *Larchbank* was, when the fog came down, rapidly approaching the *British Petrol* in an endeavour to take up her position astern of her. The matter, as it seems to me, may be tested by asking the

(1) (1941) 71 Ll. L. Rep. 93, 97.
(2) [1942] P. 69, 73.
(3) Ibid. 74.

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question, why did the *British Petrol* exhibit the cluster light at her stern? The master of the *British Petrol* in his deposition states that this action was taken, as of course it was, in order to assist the *Larchbank* in taking up her station. As the *British Petrol* heard no fog signal from the *Larchbank*, but knew, if the latter was persisting in her course and speed, that she was rapidly approaching, although the ship was out of sight, I think that, from the point of view of the *British Petrol*, there was, within the meaning of the Admiralty direction, an "emergency" strictly analogous to the situation which would have arisen if the *British Petrol* had heard the *Larchbank* approaching. If she had heard the *Larchbank* approaching, the case would admittedly be one in which the master of the *British Petrol* should use his discretion as to sounding a fog signal. It seems to me none the less an emergency if the master had good reason to think that the *Larchbank* might be approaching, even though he did not hear her. I think, therefore, that the view of the learned trial judge that there was an "emergency" must be restored. This being so, the expert advice on the question, whether the master should have exercised his discretion by sounding a fog signal is the same at every stage of the case. Bucknill J. put to the Elder Brother the question: "Ought the *British Petrol* to have "sounded fog signals if she heard nothing from the *Larchbank*?" and the answer was "Yes." The same question was put to the two nautical assessors in the Court of Appeal, who gave the same answer. Our own expert advisers in this House give the same answer to the same question, and so far, therefore, as this matter turns on nautical opinion, the conclusion is unanimous. I move that the appeal be allowed with costs here and below, and that the order of Bucknill J. be restored.

LORD ATKIN. My Lords, as I understand the judgments of the Court of Appeal they do not for their purpose dispute the findings of the trial judge, for they state the question as one purely of law. They assume, therefore, that, as found by the judge, the *British Petrol* knew that the *Larchbank* was approaching her in a thick fog. Nevertheless, the Admiralty instruction giving a master discretion to sound a fog signal "in emergency" did not apply, for "emergency" means a sudden occurrence of facts causing an apprehension of danger, and in this case there was no such occurrence after the fog had come down. Fog itself could not constitute an emergency. My Lords, it would seem to follow that although the Admiralty instructions expressly give to the master a discretion to sound a fog signal when he hears another ship approaching, they do not give him a similar discretion when he knows otherwise than by hearing that another ship is approaching. This seems to me an impossible result. I think with respect that in this case too much deference was shown to the meaning in the dictionary consulted, which was too narrow. "Emergency" can be used to describe a state of things which is not the result of a sudden occurrence. A condition of things causing a reasonable apprehension of the near approach of danger would, I think, constitute an emergency. The gradual approach of a hostile invader might well at some time or other constitute an emergency. So might the position arising from the presence of a large hostile force encamped near the frontier and only awaiting favourable conditions for an advance. Indeed, the phrase "state of emergency" seems to indicate the absence of suddenness. To ascertain the true meaning of the words we must bear in mind the circumstances in which they are used, in a book of information and instructions issued by sailors to sailors and to be construed accordingly. I cannot believe that it was contemplated that there should be a distinction between hearing and knowing of approach, or that the expression of "hearing" excluded "knowing" from the general phrase "emergency." I am of opinion that Bucknill J. rightly construed the instruction and that his finding that the master ought as a matter of reasonable nautical skill to have exercised his discretion by sounding a fog signal must stand, all the more because it is supported by the advice of all the five nautical assessors who have assisted the judge, the Court of Appeal and this House. I agree that the appeal should be allowed and the judgment of Bucknill J. restored.

LORD THANKERTON. My Lords, I concur.

LORD WRIGHT. My Lords, the only question in this appeal is whether the *British Petrol* was negligent in failing to sound signals for fog in the circumstances of the case. The answer to that question involves the construction of an Admiralty instruction issued to masters, which is to the effect that the use of fog sirens or whistles in a fog by ships in convoy is undesirable and "they should not be sounded except in "emergency or on hearing another ship approaching, when "the master must use his discretion." Bucknill J., while holding that the *Larchbank* was principally to blame, held the *British Petrol* also to blame and liable in the degree of one fourth share. He held that a state of emergency had arisen and that the master, if he had properly exercised his discretion, should have sounded his siren. The Court of Appeal reversed that finding as to the *British Petrol* on the ground that a state of emergency within the meaning of the Admiralty instruction had not arisen, and that under the instruction no occasion had arisen for the exercise of his discretion by the master of the *British Petrol.* The court, accordingly, held the *Larchbank* solely to blame. It has been stated by the Admiralty that the word " convoy " used in the instruction applies to the group of vessels of which the *British Petrol* was one. Both sides have throughout accepted that position. Hence, the instruction must be taken to have applied. It is clear that this instruction has statutory force and overrides the ordinary Regulations for Preventing Collisions at Sea, in particular, art. 15.

The appellants, the owners of the *Larchbank*, contended that the Court of Appeal wrongly absolved the *British Petrol* from blame for not sounding fog signals in the circumstances. I have read the opinion of my noble and learned friend the Lord Chancellor in print, and entirely agree with it. I merely desire briefly to indicate why I am, with all respect, unable to agree with the judgment of the Court of Appeal. That judgment, I think, depended on the construction adopted by the court of the Admiralty instruction, or, perhaps more accurately, the view taken by the court as to its application to the facts as they presented themselves to the mind of the court. The construction of the order depended primarily on the meaning to be given to the word " emergency " used in the instruction. MacKinnon L.J. said (1) : "In my opinion, "the Admiralty directions, which have that [i.e., statutory] "sanction, forbade the master of the *British Petrol* to sound "his whistle except in an event which did not happen, and "I cannot think it right to hold him guilty of negligent "navigation in not doing that which he was forbidden to do." If either of the events which removed the prohibition had arisen, the views and advice of our assessors would be very pertinent as to the proper use of the discretion which the

(1) [1942] P. 69, 74.

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captain is then directed to exercise. But unless and until the prohibition has been removed the material question is one purely of law and not of the art of navigation. It is clear that the second alternative contemplated by the instruction did not occur. Was there then a state of emergency? The lord justice says: "No." He would define emergency (1) as "the sudden occurrence of facts causing an "apprehension of danger or difficulty." Fog, he truly observed, is not in itself enough to remove the prohibition. There must be some other circumstance which requires the master to exercise his discretion to sound his whistle. He went on, as I understand his judgment, to hold that there was nothing to cause an apprehension of danger or difficulty. In this he differed from the finding of the judge, to which I shall refer in a moment. The lord justice thus stated his view of the position (1): "The master of the *British Petrol* knew that "those in charge of the *Larchbank* knew of and were also "bound by the Admiralty regulations. They knew that it "was the duty of the *British Petrol* to keep her speed in the "fog and her course and not to sound her whistle unless the "*Larchbank* invited her to do so by sounding hers, or unless "an emergency arose. I cannot think that the master of the "*British Petrol* ought to have imagined that the *Larchbank* "was '*doing what she ought not to do*' (to use the judge's phrase), "and that this apprehension created an emergency. In my "view, he was entitled to assume that the *Larchbank* would do "the proper thing." Hence he held that no emergency was established.

A different view of the situation is taken by Bucknill J. I can best state it by quoting his clear and succinct summary(2): "[The *British Petrol*] had got into a very dense fog; she was "proceeding at a high speed, a speed which, but for the "Admiralty instructions [that is as to route and speed], would "have been greatly in excess of what was moderate in that "weather; she knew that a vessel was approaching her with "the intention of coming in under her stern to join the convoy; "she did not know the precise position of that vessel; she "heard no signal from her, and she did not know what she "was doing, whether she was doing what she ought to do— "edge away—or whether she was edging towards her; and "in my view a state of emergency had arisen so far as the "*British Petrol* was concerned with relation to the *Larchbank*,

(1) [1942] P. 69, 73.

(2) 71 Ll. L. Rep. 93, 97.

"and I think she ought to have sounded a fog signal. It "would have helped to tell the *Larchbank* where she was." I agree with the judge's analysis and appraisement of the situation. As a mere matter of construing the words of the Admiralty instruction, some confusion may have arisen from substituting for the actual words "in emergency" the words "in an emergency." The judge used the phrase "a state of "emergency," which I prefer.. Emergency is often sudden in its onset, although I do not attach so much importance to the element of suddenness. It is in any case not a mere punctum temporis. It is an abnormal state of danger which may last for some time. That this is its meaning in the instruction is shown, for instance, by the reference to an approaching vessel, which involves a succession of sounds in time. Analogous to such a case is that of the fog coming down when two or more vessels are manœuvring near each other and their actual movements can no longer be seen. The instruction is concerned with a state of actual danger, and is specifically directed to the danger of collision. It is contemplating an objective state of facts, rather than the mental apprehension of the master who may fail to appreciate what he ought to do and may fail to exercise his discretion as he ought; or, on the other hand, he may appreciate the danger, as it is clear the master of the *British Petrol* did, because he exhibited the cluster light, a powerful light, at his stern in order to indicate his position to the *Larchbank* if she came close, but he failed to take the obvious effective course of using his siren to show where he was. Whether he realized it or not, he was in fact relieved from the prohibition. It is true, as MacKinnon L.J. said, that the fog was not in itself sufficient to create a state of emergency. Something more was necessary. The extra and abnormal risk which here, in my opinion, constituted emergency consisted in the nearness of the *Larchbank* when the fog came down, her probable and at least possible operation of continuing to join the convoy, and the impossibility in the absence of fog signals, after the weather became so thick, of knowing where she was or what she was doing, particularly as no signal was heard from her. The master was, indeed, left with a discretion whether he would or would not sound his fog signal, or, if so, how often. This is a separate issue which only arises if there is found to be emergency. I think there was emergency. The judge has found, and I agree with him, that he exercised his discretion wrongly. It is not unimportant that the distinguished Admiralty assessors who have sat to assist your Lordships have expressed the same view. They have said in answer to questions put to them that there was emergency and that sound signals should have been used. Their opinion is given merely as experts on matters of fact and good seamanship, and does not relieve your Lordships of your responsibility to decide the case, but the opinion which they give as experts in seamanship must be considered. In the Admiralty Court, as MacKinnon L.J. records, the assessor advised the judge that the *British Petrol* ought to have sounded fog signals if he heard nothing (as was the case) from the *Larchbank*. MacKinnon L.J. reports that the assessors who sat with the Court of Appeal gave substantially the same answer. On this point, therefore, there is complete unanimity of expert opinion. On the whole case my conclusion is that the judgment of the learned judge was correct and should be restored. I agree that the appeal should be allowed.

LORD PORTER. My Lords, this case arises out of one of the modifications in the Regulations for the Preventing of Collisions at Sea necessitated by the exigencies of war. In ordinary conditions in fog a steam vessel would be under an obligation to comply with art. 15 of those regulations and, while under way, to sound at intervals of not more than two minutes a prolonged blast. Under the Emergency Powers (Defence) Act, 1939, s. 1, sub-s. 4, reg. 43 (1.), of the Defence (General) Regulations, 1939, and Navigation Order No. 1, 1939, the Admiralty have issued instructions which are binding on mariners in war time, one of which is that the use of fog sirens or whistles in a fog by ships in convoy is undesirable and that "they should not be sounded except in emergency "or on hearing another ship approaching, when the master "must use his discretion."

From the findings of the learned judge who tried the case it appears that he came to the conclusion (1.) that there was an emergency, and (2.) that in that emergency the master of the *British Petrol*, by failing to sound a fog signal, acted negligently and was partly instrumental in causing the collision which occurred. The Court of Appeal, as I understand them, did not consider the second question but confined their attention to the first. In their view there was no emergency, and, therefore, the second question did not arise. Both questions have, however, been canvassed before your Lordships, and it is necessary to form an opinion on them. Each of the parties took the view that the ships were in convoy within the definition of that word contained in the Admiralty instructions, and I agree with your Lordships that they were right in this view. The ships were in a group sailing to join a larger convoy, were under the command of the commodore vessel and were bound to follow its instructions, and to that extent under Admiralty control.

Was there, then, an emergency? It is, I think, plain that fog alone, even thick fog, does not constitute an emergency—there must be some further element combined with it to produce this result. No doubt, the thicker the fog the more easily the existence of any further element may produce an emergency, but the fact that the instruction assumes fog and yet in fog forbids sounding except in an emergency shows, as I think, that fog of itself is not enough. I should not myself be averse to taking Mr. Carpmael's definition of an emergency, namely, "Some danger, actual or apprehended, "over and above the normal condition of affairs existing at the "material time, which was or ought to have been known to "the master," or, to take a definition which he accepted in the course of his argument, "the reasonable apprehension "of an immediate danger." I would only qualify the latter by saying that by the word "immediate" I do not understand that the danger must be sudden, but that the possibility or probability of its incidence must be immediately present. In the present case there was an additional element, the known presence of a ship, which had been instructed to fall in behind the *British Petrol*, which had exchanged signals with that vessel, and, at any rate until the thick fog came down, was beginning to manœuvre towards that end. That the master of the *British Petrol* should have envisaged, and, indeed, did envisage, the likelihood of the *Larchbank* continuing her attempt to join the convoy is demonstrated by the fact that he switched on his cluster light at the stern in order to enable her to pick up his ship and take station behind it.

The kind of emergency with which the instruction is intended to deal may, perhaps, be gathered from the fact that one of the occasions on which a master may at his discretion sound a fog signal is if he hears another vessel approaching. If, then, he knows that a ship intended to close with him and that there is a probability, or, at any rate, a reasonable possibility, of her continuing to carry out that intention, the circumstances

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seem to be comparable to those existing when the approach of a vessel is heard. It is, however, said that no master would reasonably anticipate another vessel's continuance in such a manœuvre once thick fog had descended. He would rather expect the other ship to maintain the parallel course which she was already following. The answer is, I think, to be found in the action which the master of the *British Petrol* in fact took in switching on his cluster light. In his finding the learned judge said of that ship (1): "She had got into a "very dense fog; she was proceeding at a high speed, a speed "which, but for the Admiralty instructions, would have been "greatly in excess of what was moderate in that weather; "she knew that a vessel was approaching her with the intention "of coming in under her stern to join the convoy; she did "not know the precise position of that vessel; she heard no "signal from her, and she did not know what she was doing, "whether she was doing what she ought to do—edging away— "or whether she was edging towards her." Later on he added: "The *British Petrol*, I think, knew quite well what "the *Larchbank* was going to do, namely, that she was going "to starboard her wheel and come towards her and get under "her stern. That is why she put the light over the stern . . . ."

My Lords, the learned judge had ample evidence to justify these findings and inferences of fact, and I see no sufficient reason for disregarding them. They constitute, in my view, an emergency, and, therefore, justify the imputation of some blame to the *British Petrol* provided that in the emergency the master of that vessel did not act with sufficient prudence. The argument that he did act properly, or, at any rate, not improperly, was put in the following way: The Admiralty instructions, it is said, do not order the master to sound a signal in case of an emergency in fog. The action to be taken is left to his discretion, and a prudent master in the combination of circumstances which obtained would have refrained from sounding because the possibility of collision was too remote to justify disregarding the obvious risk of endangering the convoy by giving a sound signal. This was not the view either of the experts who advised the learned judge or of those who sat to assist the Court of Appeal. Nor is it the opinion of the assessors who attended in your Lordships' House. The Court of Appeal, as I have said, found it unnecessary to express any opinion on this question, but the learned judge, agreeing with the advice tendered to him, thought that "the "whistle of the *British Petrol* should have been sounded "when she ran at full convoy speed through a dense fog and "knew what the *Larchbank* was presumably trying to do." Again I think the learned judge could properly come to this conclusion and that his opinion should be upheld. The question is one of seamanship on which the advice of the experts who have assisted the various tribunals before whom the case has been argued is all one way. Furthermore, your Lordships in supporting the decision of the learned judge on this point will not be differing from the Court of Appeal whose conclusions were reached solely as a result of their view that no emergency had arisen. I would allow the appeal.

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(1) 71 Ll. L. Rep. 93, 97.

Appeal allowed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *William A. Crump & Son.*

[PRIVY COUNCIL.]

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Jan. 22.

MARRACHE . . . . APPELLANT;

AND

ASHTON . . . . RESPONDENT.

[AND CONNECTED APPEAL.]

ON APPEAL FROM THE SUPREME COURT OF GIBRALTAR.

Gibraltar—Mortgage—Currency—Covenant to pay Spanish pesetas—Measure of damages for breach—Bank of Spain peseta notes legal tender in Spain—Market in Gibraltar—Gibraltar market rate applicable.

Where the appellant had covenanted in a mortgage deed to pay to the respondents in Gibraltar a specified number of "pesetas," and it was established that Bank of Spain peseta notes were legal tender in Spain and that there was a recognized and accessible market for such notes in Gibraltar where the rate of exchange was 132 pesetas to the pound sterling as against the official rate of 53 fixed in Spain for use at the frontier custom house, the measure of damages for the appellant's failure to deliver the stipulated quantity of the "commodity" which he had

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* *Present:* LORD MACMILLAN, LORD ROMER, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

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contracted to deliver—peseta notes not being currency in Gibraltar—was the sum in sterling which it would have cost the respondents to obtain for themselves in the Gibraltar market the amount of the commodity which the appellant had failed to deliver. Accordingly, the respondents, who had claimed the equivalent in sterling of the pesetas at the rate of 53 to the pound as being the rate legally recognized in Spain, were only entitled to a sterling payment at the rate of 132 pesetas to the pound. The parties to the contract being resident in Gibraltar, and their rights and obligations thereunder being admittedly governed by the law of Gibraltar, the fact that at the material time the import to or export from Spain of Bank of Spain peseta notes was prohibited by Spanish law unless under conditions here immaterial was irrelevant for the purposes of this case.

In re Chesterman's Trusts. Mott v. *Browning* [1923] 2 Ch. 466, at 478, and *Pyrmont, Ld.* v. *Schott* [1939] A. C. 145, referred to.

Judgment of the Supreme Court of Gibraltar set aside.

APPEAL (No. 55 of 1940) from a judgment of the Supreme Court of Gibraltar (April 4, 1940).

The following facts are taken from the judgment of the Judicial Committee: By a mortgage, dated October 28, 1931, on freehold property in Gibraltar the appellant, Marrache, covenanted to pay to the respondent, Onos, on October 31, 1936, " the sum of 50,000 pesetas " in consideration of an advance of that amount. By a second mortgage on the same property, dated November 22, 1933, the appellant covenanted in similar terms to repay to the respondent, Ashton, on October 31, 1936, a loan of " the sum of 25,000 pesetas." By a third mortgage, also on the same property, dated March 28, 1934, the appellant covenanted to repay to the respondent, Ashton, on October 31, 1936, " the sum of 35,000 pesetas," being the amount of a further loan. On May 25, 1939, the respondent, Ashton, took out a writ of summons in the Supreme Court of Gibraltar against the appellant claiming payment of the sum of 1433*l.* 10*s.* as the equivalent of 60,565.45 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sums with interest then due under the second and third mortgages. On the same date the respondent, Onos, took out a writ of summons against the appellant claiming payment of the sum of 1200*l.* as the equivalent of 50,712.50 pesetas at 42.25 pesetas to the pound sterling, being the amount of the principal sum with interest then due under the first mortgage. The actions were not preceded by any demand for payment. They were consolidated on June 13, 1939. The appellant, in his defences,

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alleged that at the date of the raising of the actions the market value of pesetas in Gibraltar was 132 to the pound sterling, and on July 3, 1939, he tendered payment to the respondent, Ashton, of 458*l*. 16*s*. 8*d*., and to the respondent, Onos, of 384*l*. 3*s*. 9*d*., being the equivalents of the sums of pesetas due by him at the rate of 132 pesetas to the pound sterling. On the tenders being refused he paid those sums into court on July 3, 1939. The rate of 42.25 pesetas to the pound sterling adopted by the respondents in their original claims was admitted to be the official rate of exchange current in London under the Clearing Office (Spain) Order, 1936, but in the course of the proceedings the respondents departed from their claim to apply that rate, and maintained that the rate of 53 pesetas to the pound should be applied. To that contention Beatty, C.J., of Gibraltar, who tried the case, gave effect, and on April 4, 1940, he pronounced judgment in favour of the respondent, Ashton, for 1181*l*. 14*s*., and in favour of the respondent, Onos, for 992*l*. 8*s*. 11*d*. It was against that judgment that the present appeal was brought.

All three parties were resident in Gibraltar, and their rights and obligations under the mortgages in question were admittedly governed by the law of Gibraltar, which was the place of payment of the sums in pesetas due by the appellant. The amount of those sums was admitted to be correctly stated in the writs of summons as at May 25, 1939, when the writs were issued, and that date, it was agreed, was the date at which the appellant's liability should be ascertained. Evidence of legal and financial experts was adduced on both sides from which it appeared that in October, 1936, and until January 20, 1939, gold and silver coins were legal tender in Spain, but that from January 20, 1939, and consequently on May 25, 1939, Bank of Spain peseta notes, popularly known as "Franco" notes, were, apart from gold, the only legal tender and currency in Spain. By a decree of the Spanish government of November 24, 1938, it was declared to be "an offence "of monetary contraband" to export from or import into Spain (inter alia) Bank of Spain peseta notes unless under conditions immaterial for the present purpose. Nevertheless there was, as the Chief Justice found, "a market for these "notes both in Gibraltar and London and elsewhere." A partner in Galliano's Bank, Gibraltar, stated that there was a regular market for them in Gibraltar and London, and that his bank bought and sold such notes in May, 1939, the rate being about 132 pesetas to the pound. He instanced a sale on May 6, 1939, to a London house of 15,000 pesetas at 145 to the pound, and produced a cable from the Midland Bank, London, reporting the market rate ruling in London for " Franco " Bank of Spain peseta notes on May 25, 1939, to be 127 to 131 pesetas to the pound for denominations of 500 and 1000. The respondents led evidence to the effect that at the Spanish frontier the official rate fixed in Spain at which tourists and labourers entering Spain from Gibraltar could exchange pounds for peseta notes at the Spanish custom house was 53 pesetas to the pound. That was the rate which the respondents, as stated, claimed to apply, as being the rate legally recognized in Spain. In their printed case before the Board the respondents stated as a fact not in dispute that "at the material time there were dealings in Bank of Spain "notes in Gibraltar and London, these notes being bought "and sold at ptas. 132 to the £," but added that " these notes "would have to be smuggled into Spain."

1942. Dec. 15, 16. *Stephen Chapman* for the appellant. The commodity to be delivered was pesetas, pesetas being a unit of account, and the form in which it had to be handed over was whatever in Spain was legal tender as pesetas. There is no dispute that the only legal tender in Spain, apart from gold, were " Franco " notes. The respondents could themselves get those notes in Gibraltar by paying one pound sterling for 132 of them, and the measure of damages for the appellant's failure to fulfil his contract would be what they would have to pay in sterling in Gibraltar for the pesetas contracted to be paid. It is irrelevant whether they are able to do anything with the commodity when they get it. They may be prohibited from taking those pesetas into Spain, but that is a currency risk affecting the creditor and is no concern of the debtor. The fallacy in the argument for the respondents is the contention that the only thing that could be done with the notes would be to smuggle them. That is erroneous, because at the relevant time banks were giving quotations of 132 to the pound. By accepting the figure of 53, the Chief Justice was, in effect, saying that the pesetas must be delivered in Spain, and that is altering the basis of the bargain. The three major premises of this argument are: (*a*) That the lex loci contractus is English, and English law is, therefore, the proper law as regards all matters of interpretation which involves the nature of the obligations which were assumed by the parties and also matters going to validity. (*b*) The lex loci solutionis is English, and English law is, therefore, the proper law as regards the manner of performance of the obligations assumed. (*c*) The lex fori is English, and English law is, therefore, the proper law as regards damages. As to (*a*), the submission that English law is the proper law of interpretation involves in effect (i.) that a contract to pay foreign units of account operates as a contract to deliver a commodity; (ii.) that the nature and identity of the commodity are fixed by ascertaining what in the country where the unit of account has currency significance is legal tender of that unit of account at the material date; and (iii.) that to ascertain what is legal tender in that country the assistance of the municipal law of the country is invoked—and that is the only relevance of Spanish law to this case. With regard to (*b*), the submission that English law is the proper law of performance lays down that, subject to its rules as to impossibility of performance, the obligor must perform the obligations which the law of interpretation says that he has assumed. There is no question of invoking any foreign law at this stage of the matter so as to vary the nature of the obligations to be performed or to provide a different manner of performance. The general effect of proposition (*c*) is that English law as the proper law of remedy involves that the damage for non-delivery of a commodity is the price which the obligee has to pay in the market to provide himself with the commodity, and "market" means the cheapest market to which it is reasonable to resort. The effect of that is that it is the commercial, and not the official rate, that is relevant. *Pyrmont, Ld.* v. *Schott* (1) reinforces the above submissions. [Reference was also made to *In re Chesterman's Trusts. Mott* v. *Browning* (2) and *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft* (3).] So far as the direct point here is concerned there are some passages in F. D. Mann on "The Legal Aspect of Money," pp. 124, 259 and 268, which support my argument, and the same conclusion is reached in an article entitled "Currency Restrictions and "the Conflict of Laws" in the Law Quarterly Review, vol. lv., p. 552.

Devlin for the respondents. This argument is on the

(1) [1939] A. C. 145.
(2) [1923] 2 Ch. 466, 472.
(3) [1939] 2 K. B. 678.

assumption that there was what amounted to an absolute embargo on the export and import of pesetas. What is to be considered is the right amount of damages for breach of contract to deliver a commodity. It is conceded that prima facie the right measure of damages is the price at which that commodity can be obtained in the nearest available market: *Moorgate Estates, Ld.* v. *Trower* (1). This is a contract to deliver a certain quantity of pesetas as units of account, and that can only be done by delivering the documents in which the peseta as a unit of account gets its physical manifestation, namely, notes. What is the commodity which the appellant was under an obligation to deliver? It is not disputed that it is pesetas as units of account, and a unit of account is a completely abstract entity. It is a unit of value or of purchasing power: *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (2). The nearest place where the respondents could get peseta notes which were legal currency was at the frontier. The market to which the party aggrieved is bound to resort must be one to which it is reasonable for a commercial man to resort. It is submitted (*a*) that there was not for sale in the Gibraltar market the commodity which the appellant was under an obligation to deliver to the respondents; and (*b*) the Gibraltar market was not a market to which a commercial or a reasonable man could be expected to resort. As to (*a*), in effect the argument for the appellant has confused peseta notes with units of account. What the respondents are entitled to are peseta notes which are commercially interchangeable for units of account, and if what they are getting are peseta notes which can only be interchanged for units of account by means of a smuggling process, they are not obtaining the commodity bargained for. To talk of a peseta as a unit of account must mean a unit of account in Spain, and what the respondents are entitled to have is 110,000 units of account in Spain. The nexus between the peseta note in Gibraltar and the unit of account in Spain had been broken. If these particular notes had been tendered in Spain they would not have been good legal tender, because they could not legally be taken into Spain. As to (*b*), the respondents are not bound to resort to this special market because it is not a commercial market. The respondents are not bound to go to a market in which the only use they could make of the notes would be subject to risk. The official

(1) [1940] Ch. 206, 211.

(2) [1934] A. C. 122, 134, 138.

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market rate is prima facie the right one. The statement in Mann on "The Legal Aspect of Money," at p. 50, is adopted as part of this argument. [Reference was also made to *Foster* v. *Driscoll* (1) and *Carling Export Brewing and Malting Co.* v. *The King* (2).] If the embargo was not absolute, then the chances of getting the notes into Spain, either by permission or smuggling, are accurately measured commercially by the difference between 132 and 53.

Chapman, in reply, referred to *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* (3); *Auckland Corporation* v. *Alliance Assurance Co.* (4); and *Rhokana Corporation* v. *Inland Revenue Commissioners* (5).

1943. Jan. 22. The judgment of their Lordships was delivered by LORD MACMILLAN, who stated the facts and continued: The question at issue between the parties to this appeal is as to the legal equivalent in sterling at Gibraltar on May 25, 1939, of certain amounts of Spanish pesetas, and the contest was narrowed to the question whether for the purposes of the cases pesetas should be reckoned at 53 or at 132 to the pound. It was common ground before their Lordships that while Bank of Spain peseta notes were legal tender in Spain they were not currency in Gibraltar, though they circulated there in considerable numbers. Consequently, these notes must be regarded in Gibraltar as commodities. It was also agreed that the appellant would have specifically performed his covenants if he had tendered to the respondents the appropriate amounts of Bank of Spain peseta notes. This was clearly so in view of the law as laid down in *In re Chesterman's Trusts* (6), where Lord Sterndale M.R. said (7): "I "think that a mortgage to secure a given number of reichsmarks "is a mortgage to secure the repayment of whatever may be "legal tender at the time of repayment in the country where the "reichsmark circulates." The law so stated was approved by this Board in *Pyrmont, Ld.* v. *Schott* (8). In that case, as here, there was an obligation to repay in Gibraltar a sum of borrowed pesetas, but at the material time peseta notes were not legal tender in Spain.

The appellant, not having specifically performed his contracts by delivering peseta notes to the respondents, became liable to them in damages for his failure to deliver to them the stipulated quantity of the commodity which he had contracted to deliver. The measure of damages for his failure is the sum in sterling which it would cost the respondents to obtain for themselves in the market the amount of the commodity which the appellant was bound, but had failed, to deliver to them. This assumes the existence of a recognized and accessible market for the commodity. On the evidence and admissions it is clear that there was a recognized and accessible market in Gibraltar for Bank of Spain peseta notes, and that the respondents on May 25, 1939, could have bought in that market 132 pesetas for a pound sterling. They could thus have provided themselves at this rate with the equivalent of specific performance of the contract. Their Lordships see no reason why, in preference to the rate obtaining in the Gibraltar market, the rate at which sterling was convertible into pesetas at the Spanish custom house at the frontier should be adopted. This was not a market rate of exchange, and it apparently worked only one way. The respondents did not need to resort to the Spanish custom house to get pesetas for pounds. It was in Gibraltar, not in Spain, that the appellant had covenanted to deliver pesetas to the respondents.

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(1) [1929] 1 K. B. 470, 510.
(2) [1931] A. C. 435, 440.
(3) [1934] A. C. 122.
(4) [1937] A. C. 587, 604.
(5) [1938] A. C. 380.
(6) [1923] 2 Ch. 466.
(7) Ibid. 478.
(8) [1939] A. C. 145.

The learned Chief Justice, however, discarded the Gibraltar market rate. The passage in his judgment dealing with the matter is as follows: " Whatever the liability of the Bank of "Spain may be to redeem these notes eventually [i.e., peseta "notes out of Spain], it appears to be clear that under the "municipal law of Spain they are not regarded, while abroad, "as part of the legal currency of the country and that they "are liable to confiscation if identifiable by the Spanish "authorities. I am of opinion that, while the prohibition "against their repatriation remains, these notes cannot be "regarded under Spanish law as legal currency in Spain." With all respect, their Lordships are unable to accept this argument. The only necessary reference to Spanish law was to ascertain what in Spain was legal tender for the payment of so many Spanish units of account. This having been ascertained, the court at Gibraltar was not concerned with the domestic currency regulations and restrictions imposed by the Spanish government. There had been no Spanish decree demonetizing Spanish peseta notes abroad or declaring transactions in these notes by foreigners abroad to be illegal, if, indeed, the Spanish government could have effectually so decreed with regard to transactions by foreigners abroad. For the purposes of the present suits the Spanish prohibition on the import to, or export from, Spain of Bank of Spain peseta notes was, in their Lordships' opinion, irrelevant. A contract between foreigners abroad involving the introduction of peseta notes into Spain in contravention of Spanish law would have raised quite a different question. No such question arose here. The parties were not governed by Spanish law. All that the court had to do was to ascertain what was legal tender in Spain for so many pesetas, and then to inquire whether there was a market in Gibraltar for the sale and purchase of such Spanish currency, and, if so, what was the market rate. Bank of Spain peseta notes were legal tender in Spain, there was a market for such notes in Gibraltar, and the rate there prevailing was 132 pesetas to the pound sterling.

Their Lordships will, accordingly, humbly advise His Majesty that the appeal be allowed, that the judgment of the Chief Justice of the Supreme Court of Gibraltar be recalled, and that the case be remitted to the Supreme Court at Gibraltar to give judgment against the appellant in favour of the respondent, Ashton, for the sum of 458*l.* 16*s.* 8*d.*, and in favour of the respondent, Onos, for the sum of 384*l.* 3*s.* 9*d.* The respondents will pay to the appellant his costs of the present appeal and of the proceedings in the Supreme Court of Gibraltar subsequent to July 3, 1939, when the appellant paid into court the sums for which he is now found to be liable. As the writs in the actions were issued without any previous demand for payment the parties will each bear their own costs of the proceedings prior to July 3, 1939.

Solicitors for appellant: *Docker, Andrew & Co.*
Solicitors for respondents: *William A. Crump & Son.*

Applied. Re HATCH (*decd.*). [1948]
2 All E.R. 288.

[HOUSE OF LORDS.]

H. L. (E.)* CLAYTON AND ANOTHER . . . . . . APPELLANTS;

1942 AND

Oct. 28, 29; Dec. 4. RAMSDEN AND OTHERS . . . . . . RESPONDENTS.

Applied. In re BOUVERIE, DECD. [1952] 1 Ch. 400

Will—Condition subsequent—Forfeiture clause—Validity—Prohibition of marriage with person " not of Jewish parentage and of the Jewish " faith."

A testator, who gave a legacy and a share of residue to an unmarried daughter which he settled on her and her issue, provided by a clause in his will that, if she should at any time after his death marry a person " not of Jewish parentage and of the Jewish " faith," the trusts, powers and provisions in favour of her and her issue and any husband so married to her should cease and determine and his will should operate as if she had died at the date of the marriage. The testator having died, the daughter married a man who was not of Jewish parentage or faith :—

Held, that, on construction, there was one condition of forfeiture and not two alternative conditions, so that the condition would be void as a whole if one limb of it were void; that the first limb of the condition (as to Jewish parentage) was void for uncertainty; and (Lord Wright dissentiente) that the second limb (as to Jewish faith) was also void.

Decision of the Court of Appeal (sub nom. *In re Samuel. Jacob* v. *Ramsden* [1942] Ch. 1) reversed.

APPEAL from the Court of Appeal.

The facts were stated by Lord Russell of Killowen and Lord Romer as follows: By his will the testator, Barnett Samuel, bequeathed a large pecuniary legacy and a share of residue upon trust for his daughter, the appellant, Edna Violet Clayton, who was then a spinster, for life, and after her death upon trust for her issue as she should by deed or will appoint, and subject thereto for her children as therein mentioned in equal shares, with a power to his daughter to appoint a life or less interest to a surviving husband. By cl. 8 of his will the testator declared: " Notwithstanding "anything hereinbefore contained I declare that if my said "daughter Edna Samuel shall at any time after my death "contract a marriage with a person who is not of Jewish "parentage and of the Jewish faith then as from the date of "such marriage all the trusts powers and provisions in this

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**Present:* LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, and LORD ROMER.

"my will contained and at that date subsisting and capable "of taking effect thereafter in favour of (*a*) my said . . . . "daughter . . . . contracting such marriage or (*b*) the person "with whom . . . . she shall contract such marriage or any "subsequent marriage or (*c*) any child or children thereafter "to be born of . . . . her or (*d*) the issue of such last mentioned "child or children shall cease and determine and be no longer "exercisable and this my will shall thenceforth operate and "take effect as if my said . . . . daughter . . . . had died at "the date of such marriage . . . ." The testator died on June 2, 1925. On March 5, 1927, the appellant, Edna Violet Clayton, was married to the appellant, Harold Clayton, who was an English Wesleyan and admittedly not of Jewish parentage or of the Jewish faith on any reasonably possible construction of those words. It was for some time thereafter generally assumed by everyone concerned that the forfeiture clause had operated to deprive her and her husband and any issue she might have of all interest in the estate of the testator, but by February, 1940, the appellants or their legal advisers entertained doubts as to the validity of the forfeiture clause, and, accordingly, on February 21, 1940, an originating summons was issued for the purpose (among others) of having that question decided. The summons was heard by Bennett J., who held that the clause was void for uncertainty. As regards the words " of Jewish parentage " he said (1) that he could find nothing in the will to show whether the testator used them with reference to the race of the husband's parents or with reference to their religion, and that for this reason the condition as to parentage was void for uncertainty. As regards that part of the condition that required a husband to be " of the Jewish faith " he expressed no opinion of his own (2), but merely followed the decision of Morton J. in *In re Blaiberg* (3), where that learned judge held that a condition of forfeiture in the event of marriage to a person not of the Jewish faith was void for uncertainty. An order was, accordingly, drawn up, bearing date May 22, 1941, and containing, among other things, a declaration that the conditions imposed by cl. 8 of the will were void for uncertainty. From that order an appeal was taken to the Court of Appeal by some of the respondents, another daughter of the testator, her son and the trustees of a settlement of her share. In

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(1) [1942] Ch. 1, 9.

(2) Ibid. 10, 11.

(3) [1940] Ch. 385.

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delivering the judgment of the court (Lord Greene M.R., Clauson and du Parcq L.JJ.), Lord Greene said (1) that, if the words "of Jewish parentage" referred to race, they might be too vague. He expressed no final opinion on this point, however, inasmuch as he held as a matter of construction that the words referred, not to race, but to the religion of both the husband's parents at the time of his birth. As to the words "of the Jewish faith," which he regarded for this purpose as meaning of the Jewish religion, he thought that they involved no uncertainty as it could easily be ascertained whether a husband was, or his parents were, of that religion. "Prima facie," he said (2) "the question falls to be answered "out of the mouth of the person in question." He regarded (3) the question as being merely one of fact which, if disputed, would have to be resolved by evidence like any other question of fact, and that in that event the person's bona fide sincere assertion that he adhered to the Jewish religion would be of the utmost weight. He added (4) that "mere difficulty "in ascertaining facts does not mean that the language into "which those facts have to be fitted is too uncertain to be "enforced." The appeal was, therefore, allowed, and by an order dated August 1, 1941, it was declared (inter alia) "that upon the true construction of the said will the "conditions imposed by cl. 8 thereof are not void for "uncertainty and that by reason of the said conditions the "trusts, powers and provisions in the said will contained "in favour of the defendant, Edna Violet Clayton, and "her husband and issue ceased and determined on her "marriage on March 5, 1927, ... as if she had died on "that date." The appellants appealed to the House of Lords only against this portion of the order made by the Court of Appeal.

Vaisey K.C. and *Winterbotham* for the appellants. On the true construction of cl. 8 the testator was in effect stipulating that his daughter was only to retain her interest under the will if she married a person who was a Jew both racially and by conviction, or, at any rate, by outward profession and observance. Both these qualifications, as defined in the will, are so vague and indefinite as to fall far short of the measure of precision and exactitude prescribed in *Sifton* v.

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(1) [1942] Ch. 1, 15.
(2) Ibid. 17.
(3) Ibid. 18.
(4) Ibid. 18, 19.

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Sifton (1). It is impossible to ascertain what is required as regards the degree of racial purity of the husband or his measure of conviction in regard to, or outward profession of, the Jewish faith if marriage to him was not to involve the penalties of a forfeiture. It cannot be said with certainty what the testator meant by either of the two sets of words which he used. Accordingly, the forfeiture clause is void for uncertainty: *Clavering* v. *Ellison* (2). The testator was trying to say that the husband must be a Jew by race and a Jew by religion but he has not sufficiently identified his meaning. His words raise problems which leave it in doubt what he himself would have said if asked what he meant. For example, as regards "Jewish parentage," how would a husband have stood whose parents had been converted to Judaism from Mohammedanism? If the phrase meant the religion of the parents at the child's birth, there would be a gap in the case of a posthumous child. As regards the phrase "of the Jewish faith" it is impossible to tell whether the test proposed is inward conviction or outward profession and observance. The whole phrase used attempts to express a conception too vague and nebulous for a valid defeasance clause, which requires the highest degree of certainty. The enactments making special provision for Jews on the score of their religion do not help in its construction. Order in Council, November 13, 1685, 1 Hag. Con. Appendix No. 2, p. 3: persons "of the Jewish nation"; Protestant Children of Jews Act (1 Anne, st. 1, c. 24): "Jewish parents"; Ballot (Parliamentary and Municipal Elections) Act, 1872 (35 & 36 Vict. c. 33), sch. I., part 1, para. 23: voters "of the Jewish "persuasion"; Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 91: "a person of the Jewish religion." [They referred to *In re Blaiberg* (3) and *Perrin* v. *Lyon* (4), and to the definitions of "Jew" in Johnson's Dictionary, Webster's Dictionary and the Standard Dictionary.]

Roxburgh K.C. and *Danckwerts* for the respondents. Even if the expression "of Jewish parentage" be void for uncertainty, that does not remove the disqualification of one who lacks the "Jewish faith," which expresses a clear conception. Though the event, marriage, on which defeasance would take effect is a single event, it is marriage to a particular man lacking two qualifications. If the man is either not "of

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(1) [1938] A. C. 656.
(2) (1859) 7 H. L. C. 707.
(3) [1940] Ch. 385.
(4) (1807) 9 East. 170.

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"Jewish parentage" or not "of the Jewish faith" he is disqualified. If one of these phrases cannot be construed it must be disregarded, because the court cannot find the meaning of the testator, but if the same man must have two qualifications, one of which is capable of construction, though the other is not, there is no reason why the one which can be construed should be disregarded. Effect can be given to part of the testator's intentions which have been expressed on two different matters. The phrase "of Jewish parentage," however, should not be held to be uncertain unless it is impossible to construe it in a manner which will give it a certain meaning. If a phrase be capable of more than one meaning the court must select one, for uncertainty has nothing to do with difficulties of construction: *Sifton* v. *Sifton* (1). This is a case of an English testator who was a Jew. He may have known nothing about *Clavering* v. *Ellison* (2), but he did know about the Jewish community, and he must have been aware that, if a racial test were adopted, it was impossible to apply. For example, the words "of Jewish parentage" might mean someone who was descended from Jacob by both his parents. If that were so, the condition would not be void for uncertainty, but the matter would be incapable of proof: see *In re Lanyon* (3). The test must be religious. In all statutes and legal documents hitherto construed the distinction made in regard to the Jews has been religious and not racial. From 1740 onwards there have been a great many statutes containing such phrases as "professing the Jewish religion." [They referred to *In re De Wilton. De Wilton* v. *Montefiore* (4).] The phrase "of the Jewish faith" must take its colour from the context. When it is used as a description of a person it is equivalent to "religion." A person who belongs to a recognized Jewish community exercising the rites of the Jewish religion is a person "of the Jewish faith." When the testator said that the husband must be "of the Jewish faith" he meant that he must claim to be so. If the appellants are right in their contention, many cases in the past have been decided on a wrong basis as there is no ground on which this phrase could be held void for uncertainty which would not make most religious tests void. [They referred to *Hodgson* v. *Halford* (5); *In re Borwick. Borwick* v. *Borwick* (6); *Patton*

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(1) [1938] A. C. 656, 671.
(2) 7 H. L. C. 707.
(3) [1927] 2 Ch. 264.
(4) [1900] 2 Ch. 481, 489.
(5) (1879) 11 Ch. D. 959, 964.
(6) [1933] Ch. 657.

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v. *Toronto General Trusts Corporation* (1) and Key and Elphinstone's Precedents in Conveyancing, 14th ed., vol. ii., p. 858, note (*c*).] On any construction of the clause, the husband, who is an English Wesleyan, is disqualified as being neither of Jewish parentage nor of the Jewish faith. In his will the testator was not using words in a critical or analytical manner, but in the sense understood by the ordinary man. The question really is whether any ordinary person would say that the husband was "of Jewish parentage and of the Jewish "faith." [They referred to *In re Lloyds Bank, Ld. Bomze* v. *Bomze* (2).]

Vaisey K.C. replied.

The House took time for consideration.

1942. Dec. 4. LORD ATKIN. My Lords, I have had the advantage of reading in advance the opinion about to be delivered by my noble and learned friend Lord Romer, and, as I agree with his reasoning and its result, I need only add a few words. Like him I am unable to accept the view that "not of Jewish parentage and of the Jewish faith" means "not of parentage of the Jewish faith and of the Jewish faith." If the testator had meant this, he would have said so, and the variation in the turn of the phrase seems to me in itself a strong indication that he did not so mean. I think that, while it would be sufficient to defeat the forfeiture that either limb of the composite clause should be uncertain, in this case neither limb achieves the necessary degree of certainty. For my own part, I view with disfavour the power of testators to control from their grave the choice in marriage of their beneficiaries, and should not be dismayed if the power were to disappear, but at least the control by forfeitures imposed by conditions subsequent must be subject to the rule as to certainty prescribed by this House in *Clavering* v. *Ellison* (3), and, judged by the test there prescribed, this forfeiture fails. It is true that, as contended by Mr. Danckwerts, on any possible construction of the clause Mr. Clayton, an English Wesleyan, was disqualified. But any possible construction is not the question. The actual construction must be certain, and, as it is not, the appeal succeeds.

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(1) [1930] A. C. 629.
(2) [1931] 1 Ch. 289.
(3) 7 H. L. C. 707.

LORD THANKERTON. My Lords, I also have had the opportunity of considering the opinion about to be delivered by my noble and learned friend Lord Romer, and I agree with it, and also with the remarks just made by my noble and learned friend on the woolsack.

LORD RUSSELL OF KILLOWEN (read by LORD THANKERTON). My Lords, this is a case in which the testator has sought, in the words of the Master of the Rolls, to direct the lives of his children from the grave. The particular matter for our consideration is his attempt, by means of a forfeiture clause to take effect on the happening of a condition subsequent, to control his daughter Edna's choice of a husband. There can be no doubt as to the stringency of this clause if it be effective. Once the terms of the condition of defeasance have been fulfilled, the daughter, her husband, her children by him and their issue, and any aftertaken husband, her children by him and their issue, are one and all deprived of all the interest previously given by the will. The question for our decision is whether the trusts in the will in favour of Mrs. Clayton, her husband and issue, ceased on the marriage. The answer depends on whether the condition of defeasance is a valid condition.

My Lords, for the reasons which I will indicate I am of opinion that your Lordships should hold this condition of defeasance to be void, and allow this appeal. The courts have always insisted that conditions of defeasance, in order to be valid, should be so framed that the persons affected (or the court, if they seek its guidance) can from the outset know with certainty the exact event on the happening of which their interests are to be divested. The principle was enunciated many years ago by Lord Cranworth in *Clavering* v. *Ellison* (1), in the following words: "Where a vested estate "is to be defeated by a condition on a contingency that is to "happen afterwards, that condition must be such that the "court can see from the beginning, precisely and distinctly, "upon the happening of what event it was that the preceding "vested estate was to determine." In all such cases that is the test which has to be applied to the particular condition which the testator has chosen to impose. It was recently applied by the Judicial Committee in *Sifton* v. *Sifton* (2) to a condition of defeasance in a will as to the testator's daughter

(1) 7 H. L. C. 707, 725.

(2) [1938] A. C. 656.

"continuing to reside in Canada." The condition was held void. The testator clearly having intended that his daughter should be at liberty to leave Canada for some purposes for some periods, he had failed to define either the purposes or the periods. Hence the uncertainty which invalidated the condition.

Let me now apply the principle to this condition. The crucial words are "who is not of Jewish parentage and of the "Jewish faith." A preliminary question was raised. Is this one condition, or do the words impose alternative conditions on the happening of either of which a forfeiture occurs? This is a question of construction, separate from the main question. The testator has insisted on his daughter's husband having both the qualifications which he has mentioned. It was suggested that, if there was no uncertainty as to one of the qualifications, and the husband did not possess it, the forfeiture clause would operate. I cannot agree with this view, for its corollary would be that marriage with a husband not of Jewish parentage (whatever those words mean) but who before the wedding became a convert to the Jewish faith (whatever those words mean) would not bring about a forfeiture, a result quite inconsistent with the intention of the testator as disclosed by the language which he has used. I am of opinion that there is here only one condition of forfeiture, and that the whole of the contingency on the happening of which the forfeiture is to take place must be certain.

I now turn to consider the words "of Jewish parentage." The first doubt which is obviously inherent in them is whether they refer to race or religion or to both. The Master of the Rolls referred them to religion. That part of his judgment is its mainspring, for, as will appear, had he taken the other view (though he is careful to say that he expresses no opinion on the point), his decision on the appeal might have been different. He expressed himself thus (1): "It was contended "that the words were capable of the construction that they "referred to race and not to religion. It may very well be "that if, on the true construction of the words, they did refer "to race, they might be too vague. It might be said that in "the absence of any intimation of the percentage of Hebrew "blood which the testator had in mind, it would be impossible "to determine whether or not a given person fell within the "language used. I express no opinion on that matter . . . .

(1) [1942] Ch. 1, 15.

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"In my opinion, however, the context points rather to the fact "that the testator was thinking not of race but of religion." The Master of the Rolls then indicates the context on which he relies. It is, that the husband is required to be of the Jewish faith. I quote again from the judgment: "It "is obvious from the requirements which he lays down for "the husband that it is religion of which he is thinking and "that he wishes his daughter to marry into the Jewish religion. "That, I think, gives a clue to his intention when he goes back "a generation and deals with the parents of the husband." My Lords, the context, as it appeals to me, points in the opposite direction. The testator is describing two qualities which he requires in his daughter's husband. In going back a generation he is still dealing with a quality required in the husband, namely, that his parentage should be Jewish. It seems to me much more likely that, of these two qualities, the testator is stipulating that one should be religious and the other racial, than that both should be associated with religion. In my opinion, on construction, the words "of Jewish "parentage" refer to race. Other elements of doubt surround the words. Must both parents be of the Jewish race, or would one alone, and which, suffice? I confess myself unable to find any context which provides an answer, but the answer may well be that, in the absence of a context to the contrary, the true construction is that both parents must be of the Jewish race. But at this point the real difficulty begins, namely, the question of degree. The testator has given no information or clue as to what percentage or proportion of Jewish blood in the husband will satisfy the requirement that he should be of Jewish parentage. The daughter could never, before marrying the man of her choice, be certain that he came up to the requisite standard of Jewish parentage, nor could a court enlighten her beforehand. The standard is unknown, and incapable of ascertainment. It is this uncertainty of degree which prevents the divesting event from being seen precisely and distinctly from the beginning, and which makes this condition void for uncertainty. The uncertainty attaching to the requirement of Jewish parentage avoids the whole condition subsequent, with the result that no defeasance takes place.

In these circumstances it is unnecessary to express an opinion on the certainty of the words "of the Jewish faith," but, had it been necessary, I should have felt a difficulty in holding that their meaning was clear or certain. It seems to me that (apart from the difficulty which arises from the existence of the three varieties of Judaism referred to by the Master of the Rolls) the testator has given no indication of the degree of attachment or adherence to the faith which he requires on the part of his daughter's husband. The requirement that a person shall be of Jewish faith seems to me too vague to enable it to be said with certainty that a particular individual complies with the requirement. The decision of Morton J. in *In re Blaiberg* (1), though seemingly based on the difficulty of ascertaining the state of a man's mind, may well stand on the ground of the uncertainty of the words there in question. I concur in the motion proposed by the noble Lord on the woolsack.

LORD WRIGHT. My Lords, a testator who wishes to leave an estate or interest subject to a defeasance clause must be very careful, or his lawyers must be very careful, how the clause is expressed. Lord Eldon L.C., in 1823, in *Fillingham* v. *Bramley* (2) said: "There is great difficulty in saying that a "forfeiture was incurred, when the court cannot see clearly "what it was the testator meant." Later, Lord Cranworth more precisely, in *Clavering* v. *Ellison* (3), said that: "Where "a vested estate is to be defeated by a condition on a contingency that is to happen afterwards, that condition must "be such that the court can see from the beginning, precisely "and distinctly, upon the happening of what event it was that "the preceding vested estate was to determine." Lord Cranworth treats the matter as one to be decided as it were in vacuo, simply on the construction of the clause. "The "question," he said (4), "is . . . . whether you can predicate "on reading the will, what it was that was to defeat the vested "estate?" I have wondered why this peculiar stringency should have been insisted on in these cases. The modern idea, perhaps, is that the beneficiary should be in a position to know beyond a peradventure what he is to do or not to do if he is to avoid a forfeiture. That must be ascertainable by him. As Lord Romer said, in delivering the judgment of the Judicial Committee in *Sifton* v. *Sifton* (5): "If the provision be "clearly expressed, it is the fault or the misfortune of the

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(1) [1940] Ch. 385.
(2) (1823) Turn. & R. 530, 536.
(3) 7 H. L. C. 707, 725.
(4) Ibid. 726.
(5) [1938] A. C. 656, 671.

"person affected if he should fail to know whether he is "committing a breach of it." My noble and learned friend, Lord Russell of Killowen, has given the same explanation or justification of the rule. I am not sure that more technical reasons may not have primarily weighed with Lord Eldon and Lord Cranworth. However that may be, the rule is well settled, and is not disputed by any judge in these proceedings. The Master of the Rolls in a powerful judgment has, however, held that it does not apply here.

The facts and documents have been sufficiently stated in the speech just delivered by Lord Russell of Killowen and in the speech about to be delivered (which I have read) by Lord Romer. I substantially agree with the opinions of my noble and learned friends. I shall content myself with a very few and short observations. The first question is whether the defeasance depends on one composite condition, so that, if either limb is not sufficiently clear and distinct, the whole condition is void. In my opinion, that is the true construction. The defeasance clause, which is one and indivisible, is void as a whole if one limb is void. In the language of the condition subsequent, " not of Jewish parentage and of the Jewish "faith," the word " and " is I think conclusive, even apart from material considerations which support that view. It is, then, necessary to consider each limb of the composite condition separately. In my opinion, the former limb fails to pass the test of clearness and distinctness. I am prepared to accept that it refers to both parents and not merely to one, but I think it refers to race, not to faith. These may be regarded as being matters of ambiguity in construction capable of being resolved by the court, but it is a different problem to determine what is the degree of racial purity in fact required by the condition. In that respect the clause falls short of clearness and distinctness. On reading it, the court or other party interested is left in complete doubt what degree of racial purity will satisfy the condition. Is it to be 100 per cent., or will 75 per cent. or 50 per cent. be sufficient ? The words of the clause do not enable any definite answer to be given. The Master of the Rolls construed the clause as referring to religion, not to race, but, if they were to be construed as referring to race, " they might," he said (1), "be too vague." On the construction which I adopt they are, I think, too vague. It is not that the language is ambiguous,

(1) [1942] Ch. 1, 15.

so much as imperfect and incomplete. The court would have to amplify and add to it before it could be held to denote any definite set of facts. That would be to rewrite the testator's will in that respect, and be beyond the competence of the court, and still more of the party interested. That limb of the composite condition is, therefore, void, and, it follows, so is the whole condition.

This conclusion renders it unnecessary to express a final opinion on the words "of the Jewish faith." As at present advised, I do not think they are of insufficient clearness and distinctness. I am not impressed by the contention that they refer to a state of mind or of religious conviction which is incapable of proof. States of mind are capable of proof like other matters of fact. Courts of law and equity have to decide questions of fraudulent intent or the like. I do not understand that the rule in *Clavering* v. *Ellison* (2) deals with questions of proof, but solely with the clearness and distinctness of the language used in the clause, that is, its capability of defining precisely a specific state of fact. I do not see why "Jewish faith" should not connote a specific fact equally with "Christian faith." The latter is an all-embracing term which includes many possible varieties—Roman Catholic, Anglican, Presbyterian, Lutheran and others. There are many mansions, but they are all included in one house. I should not be disposed to regard "Christian faith" as a phrase lacking in clearness and distinctness, and I see no reason in principle why "Jewish faith" is not sufficiently clear and distinct to identify a specific set of facts to which it may be applied. But I do not pursue these questionings. The view I have expressed on the words "Jewish parentage" is sufficient to decide the appeal, with the result that, in my judgment, the whole condition is void.

It may be that Mr. Clayton, however unobjectionable in other respects, would not have been welcome to the testator because of his race and religion, and it may be that in this way the intention of the testator is frustrated. But that is not the question. The rule, if I understand it, is not concerned with actual facts but merely with the clearness and distinctness of the clause. I agree that the appeal should be allowed.

LORD ROMER. My Lords, this appeal is concerned with a clause in the will of one Barnett Samuel, who died on June 2,

(2) 7 H. L. C. 707.

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1925. He was one of those testators, of whom I venture to think there have been far too many, who, by means of a forfeiture clause, have sought to compel a person to whom benefits are given by the will to act or refrain from acting in matters concerned with religion, not in accordance with the dictates of his own conscience, but in accordance with the religious convictions of the testator himself. That a testator may do this should he so desire is beyond question, but in such a case it behoves him to define with the greatest precision and in the clearest language the events in which the forfeiture of the interest given to the beneficiary is to take place. The rule as to clauses forfeiting by condition subsequent interests given by a will has long been settled by a decision of your Lordships' House. It is the case of *Clavering* v. *Ellison* (1), where the rule is stated by Lord Cranworth in these words: "I consider that, from the earliest times, one of the cardinal "rules on the subject has been this: that where a vested "estate is to be defeated by a condition on a contingency "that is to happen afterwards, that condition must be such "that the court can see from the beginning, precisely and "distinctly, upon the happening of what event it was that "the preceding vested estate was to determine." The question to be decided on this appeal is whether the forfeiture clause contained in the will of Barnett Samuel satisfies the requirements of the rule to which I have just referred. If it does not, it is void for uncertainty.

My Lords, the first matter for determination on the appeal is what is the meaning of the words " of Jewish parentage." Do they refer to race or religion? This is, no doubt, a difficult question to answer, but the difficulty of answering it does not render the forfeiture clause void for uncertainty. It is the duty of the court to solve the problem if it be possible to do so, and, for my own part, I do not find it impossible. In my opinion, on the true construction of this will, the words refer to race and not to religion or faith, which, I agree with the Master of the Rolls, are for the present purpose synonymous terms. In the first place, the testator, in stating the qualifications that must be possessed by a husband of his daughter, Edna, seems to be drawing a clear distinction between parentage and faith. If he had intended that the husband should be, and his parents should have been, of the Jewish faith, he could so easily have said so. I cannot think that he would

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(1) 7 H. L. C. 707, 725.

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have used the language in which this clause is in fact expressed. In the next place, it seems to me to be much more probable that, when stating the qualifications to be possessed by a husband of his daughter, the testator, while stipulating that he should be of the Jewish faith, should concern himself in addition with the racial descent of the husband rather than with the religion of the husband's father and mother. Finally, one of the meanings of the word " parentage," and I am disposed to think its primary meaning when coupled with a word indicating nationality such as Jewish, English, French or the like, is race or descent.

What then did the testator mean by the stipulation that the daughter's husband was to be of Jewish race or descent ? It cannot reasonably be supposed that the husband was to show an unbroken line of descent from the patriarch Jacob. If the daughter were compelled to wait for such a husband she would remain a spinster all her life, and the condition would be void as amounting to a total restraint on marriage. It seems far more probable that the testator meant no more than that the husband should be of Hebraic blood. But what degree of Hebraic blood would a permissible husband have to possess ? Would it be sufficient if one only of his parents were of Hebraic blood ? If not, would it be sufficient if both were ? If not, would it be sufficient if, in addition, it were shown that one grandparent was of Hebraic blood or must it be shown that this was true of all his grandparents ? Or must the husband trace his Hebraic blood still further back ? These are questions to which no answer has been furnished by the testator. It was, therefore, impossible for the court to see from the beginning precisely or distinctly on the happening of what event it was that Mrs. Clayton's vested interests under the will were to determine, and the condition is void for uncertainty.

My Lords, this is sufficient to dispose of the appeal. If one of the two qualifications required in a permissible husband is expressed in so uncertain terms that it is impossible to say of any particular individual whether he does or does not possess it, the whole condition is void, for it is a composite qualification that is required, and, if it cannot be said of an individual that he possesses part of the composite qualification, it is obvious that he cannot be said to possess the whole. It is impossible, merely because the condition as to Jewish parentage fails for uncertainty, to split up the forfeiture clause in such a way as to permit, for example, marriage with a husband whose ancestors have been Christian for many generations but who on the eve of the marriage has embraced the Jewish faith in the fullest sense of those words. Such a thing would be quite contrary to the testator's intention. His intention cannot be given effect to because he has not chosen to express it in sufficiently unambiguous terms, but that does not justify the court in making a new will for him and treating him as if he had expressed a different intention altogether.

Even if the clause could be read as though it merely provided for a forfeiture in the event of the daughter being married to a man not of the Jewish faith, I am of opinion that it would still be void for uncertainty. For how is it to be ascertained whether a man is of the Jewish faith? The Court of Appeal answered this question by saying that whether a man was or was not of the Jewish faith was a mere question of fact to be determined on evidence, and that the assertion by the man that he was of that faith was well nigh conclusive. I should agree entirely with the Court of Appeal as to this if only I knew what was the meaning of the words "of the Jewish faith." Until I know that I do not know to what the evidence is to be directed. There are, of course, an enormous number of people who accept every tenet of, and observe every rule of practice and conduct prescribed by, the Jewish religion. As to them there can be no doubt that they are of the Jewish faith, but there must obviously be others who do not accept all those tenets and are lax in the observance of some of those rules of practice and of conduct, and the extent to which the tenets are accepted and the rules are observed will vary in different individuals. I do not doubt that each of these last mentioned individuals, if questioned, would say, and say in all honesty, that he was of the Jewish faith. On the other hand, I do not doubt that one who accepted all the tenets and observed all the rules would assert that some of the individuals I have mentioned were certainly not of the Jewish faith. It would surely depend on the extent to which the particular individual accepted the tenets and observed the rules. I cannot avoid the conclusion that the question whether a man is of the Jewish faith is a question of degree. The testator has, however, failed to give any indication what degree of faith in the daughter's husband will avoid, and what degree will bring about, a forfeiture of her interest in his estate. In these circumstances the condition requiring that a husband shall be of the Jewish faith would, even if standing alone, be void for uncertainty. I would allow this appeal.

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Appeal allowed.

Solicitor for appellants : *L. A. Hart.*
Solicitors for respondents : *Hunt & Hunt.*

[HOUSE OF LORDS.]

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Dec. 7, 8, 9.

BRITISH AMERICAN TOBACCO COMPANY, LIMITED . . . . APPELLANTS ;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—National Defence Contribution—Company—Controlling interest in another company—Direct or indirect interest—Finance Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 54), *sch. IV., para.* 7 (*b*).

Schedule IV. to the Finance Act, 1937, in dealing with the computation of profits for the purpose of national defence contribution provides by para. 7 (*b*) that " in the case of . . . . a " trade or business carried on by a body corporate, the profits " shall include all income received by way of dividend or distribution of profits from any other body corporate in which the " first-mentioned body corporate has a controlling interest and " which is not liable to be assessed to the national defence " contribution."

The words " controlling interest " in para. 7 (*b*) include, not only direct control by the company which it is sought to tax, but also an indirect controlling interest, such as the holding of a controlling interest in another company which itself holds a controlling interest in the company not liable to be assessed to the national defence contribution.

The holding of a bare majority of voting power in a company is in general sufficient to constitute " a controlling interest," and it is not necessary to hold such a proportion of the shares as would secure the passing of a resolution for which a special majority is required.

B. W. Noble, Ld. v. *Inland Revenue Commissioners* (1925) 12 Tax Cas. 911 approved.

Decision of the Court of Appeal [1941] 2 K. B. 270 affirmed.

**Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD PORTER.

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BRITISH AMERICAN TOBACCO CO. *v.* INLAND REVENUE COMMISSIONERS.

APPEAL from the Court of Appeal.

At a meeting of the Special Commissioners of Income Tax held on October 19, 1939, the appellants appealed against an additional assessment to national defence contribution in the sum of 354,864*l.* for the period commencing April 1, 1937, and ending September 30, 1937. The appellants owned shares in other bodies corporate carrying on business in various countries throughout the world, which were not liable to be assessed to national defence contribution, and the question for determination was whether that interest was "a controlling interest" within the meaning of para. 7 (*b*) of sch. IV. to the Finance Act, 1937. The bodies corporate concerned were eleven companies, all of which were incorporated and carried on business outside the United Kingdom, and were, therefore, themselves not liable to national defence contribution. The assessment against which the appellants appealed included dividends received by them from each of these eleven companies, in four of which the appellants held more than 50 per cent. of the voting power, and in the remaining seven of which the appellants and a company or companies in which they owned more than 50 per cent. of the votes or a company or companies in which more than 50 per cent. of the votes were owned by a company in which the appellants owned more than 50 per cent. of the votes, held more than 50 per cent. of the voting power. In the case of five of these seven companies 100 per cent. of the votes were so owned. The Special Commissioners held that the appellants had "a controlling interest" in each of the eleven companies, and they dismissed the appeal. The commissioners having, at the request of the appellants, stated a case for the opinion of the High Court, Lawrence J. and the Court of Appeal (Scott, Clauson and Goddard L.JJ.) affirmed the view of the commissioners. The appellants appealed to the House of Lords by special leave of the House.

Tucker K.C. and *Scrimgeour* for the appellants. One company can only have "a controlling interest" in another by itself being the beneficial owner of a number of shares, registered either in its own name or in that of a nominee, sufficient to control that company. The words "controlling "interest" import a proprietary right, and it is not possible to look beyond the direct shareholding of the appellants. If the legislature had intended that "controlling interest"

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should include an indirect interest it would have said so expressly, as it did in the Finance Act, 1920, s. 53, sub-s. 2 (*b*). In using the words "a controlling interest" it was not adopting a phrase which was well understood to bear the meaning contended for by the respondents. The question is not whether the appellants control, or have the ability to control, a particular company, but whether they have "a controlling "interest" in it, which is not the same thing. Generally speaking, shareholding or stockholding alone constitutes an interest in a company limited by shares. Debenture holders have no interest in a company unless there are special provisions as to voting powers, since a creditor's interest is not in a company but in its property. "A controlling interest" in a body corporate imports the ability to control its actions in general meeting and that is only conferred by direct shareholding. Thus, if A company has a controlling interest in B company, which in turn has a controlling interest in C company, A company has not a controlling interest in C company. The holding by the appellants of shares in an intermediate company does not, accordingly, transmit to them the interest of that company in a foreign company. [They referred to *Glasgow Expanded Metal Co., Ld.* v. *Anderson* (1), *Macaura* v. *Northern Assurance Co., Ld.* (2); *Gramophone and Typewriter, Ld.* v. *Stanley* (3); Finance Act, 1922, s. 21; Finance Act, 1940, ss. 29, 55.] It is the wrong way to approach a taxing Act to assume a governing principle and then make the language fit it: *Tennant* v. *Smith* (4). This is a case in which the form of the transaction is its substance: *Inland Revenue Commissioners* v. *Duke of Westminster* (5). In any event "a controlling interest" imports control, not only of a bare majority of the shares, but of such proportion of them as would secure the passing of a special resolution or any other resolution for which a special majority is required by the articles of association or the law of the country of incorporation. The appellants have not "a controlling interest" in that sense. Unless there is such control in all matters as shareholders can in law exercise, the control is only partial. A person has not a controlling interest unless at a general meeting he is the shareholder who is more powerful than all the rest put together and can make his will

(1) 1923 S. C. 365; 12 Tax Cas. 573.

(2) [1925] A. C. 619, 626, 630.

(3) [1908] 2 K. B. 89.

(4) [1892] A. C. 150.

(5) [1936] A. C. 1.

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prevail over that of all the others to the extent of dismissing the directors or changing the articles of association. [They referred to *Quin & Axtens, Ld.* v. *Salmon* (1); *Automatic Self-Cleansing Filter Syndicate Co., Ld.* v. *Cuninghame* (2) and *B. W. Noble, Ld.* v. *Inland Revenue Commissioners* (3).] There is some doubt whether the meaning contended for by the appellants or that contended for by the respondents or some other meaning is correct and in construing a taxing Act a genuine ambiguity should be resolved in favour of the taxpayer rather than the Crown: *Hennell* v. *Inland Revenue Commissioners* (4).

Sir Donald Somervell A.-G., *J. H. Stamp* and *R. P. Hills* for the respondents were not called on to argue.

Viscount Simon L.C. Mr. Tucker, for the appellants, has put forward two contentions in support of the view that the appellants had no controlling interest in the foreign companies referred to in the case. First, he argued that "interest" in this connexion means interest of a proprietary nature, and that the condition that there should be "a controlling interest" would only be satisfied if the appellants themselves owned sufficient shareholding in the other company to control the latter. Secondly, he contended that, in any event, a controlling interest is not constituted by the control of the bare majority of shares (whether directly or through other companies), but that the control must be of such proportion of shares as would secure the passing of a special resolution or other resolution for which a special majority is required by the terms of the constitution of the foreign company. These two contentions have been rejected as unsound by each tribunal which has dealt with the appellants' claim, and at each stage the decision arrived at has been in favour of the Crown. Notwithstanding the full and careful argument addressed to the House, I take the view that the decision arrived at below was correct, and I understand that your Lordships are in agreement with me that the appeal should be dismissed.

The case turns on the meaning of the words "controlling "interest" in the context in which they are used. The appellants argue that, in order that one company should have "a "controlling interest" in another, it must be the beneficial owner

(1) [1909] A. C. 442.
(2) [1906] 2 Ch. 34.
(3) (1925) 12 Tax Cas. 911.
(4) [1933] 1 K. B. 415, 420.

of a requisite number of shares in that other company, either registered in its own name or in the name of its nominees, and that, if company No. 1 owns all the shares in company No. 2 which in turn owns all the shares in company No. 3, company No. 1 has no interest, controlling or otherwise, in company No. 3. It is true that in such circumstances company No. 1 owns none of the assets of company No. 2, and a fortiori owns none of the assets of company No. 3, and in that sense neither owns, nor has an interest in, company No. 3, but that is to treat the phrase "controlling interest" as capable of connoting only a proprietary right, that is, an interest in the nature of ownership. The word "interest," however, as pointed out by Lawrence J., is a word of wide connotation, and I think the conception of "controlling interest" may well cover the relationship of one company towards another, the requisite majority of whose shares are, as regards their voting power, subject, whether directly or indirectly, to the will and ordering of the first mentioned company. If, for example, the appellants own one-third of the shares in company X, and the remaining two-thirds are owned by company Y, the appellants will none the less have a controlling interest in company X if they own enough shares in company Y to control the latter. In my opinion, this is the meaning of the word "interest" in the enactment under consideration, and, where one company stands in such a relationship to another, the former can properly be said to have a controlling interest in the latter. This view appears to me to agree with the object of the enactment as it appears on the face of the Act. I find it impossible to adopt the view that a person who (by having the requisite voting power in a company subject to his will and ordering) can make the ultimate decision as to where and how the business of the company shall be carried on, and who thus has in fact control of the company's affairs, is a person of whom it can be said that he has not in this connexion a controlling interest in the company.

As to what may be the requisite proportion of voting power, I think a bare majority is sufficient. The appellants have, in respect of each of the foreign companies referred to in the case, the control of the majority vote. I agree with the interpretation of "controlling interest" adopted by Rowlatt J. in *B. W. Noble, Ld.* v. *Inland Revenue Commissioners* (1), when construing that phrase in s. 53, sub-s. 2 (*c*), of the Finance Act,

(1) 12 Tax Cas. 911, 926.

1920. He said that the phrase had a well known meaning, and referred to the situation of a man "whose shareholding "in the company is such that he is the shareholder who is "more powerful than all the other shareholders put together "in general meeting." So here. The owners of the majority of the voting power in a company are the persons who are in effective control of its affairs and fortunes. It is true that for some purposes a 75 per cent. majority vote may be required, as, for instance (under some company regulations), for the removal of directors who oppose the wishes of the majority, but the bare majority can always refuse to re-elect and so in the long run get rid of a recalcitrant board. Nor can the articles of association be altered in order to defeat the wishes of the majority, for a bare majority can always prevent the passing of the necessary resolution. We are proceeding, in the absence of evidence as to foreign law, on the basis that the law governing these foreign companies does not differ materially from our own. I move that the appeal be dismissed with costs.

Lord Atkin. My Lords, I agree.

Lord Thankerton. My Lords, I am of the same opinion.

Lord Russell of Killowen. My Lords, I also agree.

Lord Porter. My Lords, I concur.

Appeal dismissed.

Solicitors for appellants: *Duncan Morris Oppenheim.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

[HOUSE OF LORDS.]

LONDON BRICK COMPANY, LIMITED . APPELLANTS ;

AND

ROBINSON (AN INFANT, BY HIS NEXT FRIEND) . . . . RESPONDENT.

H. L. (E.)*
1942
Nov. 5, 9 ;
Dec. 15.

Workmen's compensation—Death of workman—Children's allowance—Widow's claim satisfied independently of Workmen's Compensation Act, 1925—*Workmen's Compensation Act,* 1925 (15 & 16 *Geo.* 5, *c.* 84), *s.* 8, *sub-s.* 1.

A workman died as the result of an accident arising out of and in the course of his employment, leaving a widow and an infant child. The widow recovered compensation under the Fatal Accidents Acts, and so was debarred from making any claim under the Workmen's Compensation Act, 1925 :—

Held, that the infant child was entitled to the children's allowance under s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925, as well as the lump sum payable under the sub-section.

Avery v. *London and North Eastern Ry. Co.* [1938] A. C. 606, applied.

Decision of Court of Appeal (sub nom. *Robinson* v. *London Brick Co.*) [1942] 2 K. B. 239, affirmed.

APPEAL from the Court of Appeal.

William Arthur Robinson died on January 22, 1941, as the result of personal injury by an accident which occurred on December 20, 1940, arising out of and in the course of his employment with the appellants. He left a widow, Mabel Robinson, and an infant son, the respondent, then about one year old, both wholly dependent on his earnings. The widow took proceedings in the High Court independently of the Workmen's Compensation Act, 1925, making a claim against the appellants under the Fatal Accidents Acts and the Law Reform (Miscellaneous Provisions) Act, 1934. On October 15, 1941, a compromise was reached whereby it was agreed that the appellants should pay her 1750*l.* in respect of their liability under the Fatal Accidents Acts, but not in respect of their liability under the Act of 1934. The widow was thus excluded by s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925, from claiming under that Act. The respondent, by his next friend, made a claim on his own

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**Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROMER.

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behalf under the Workmen's Compensation Act, 1925, for compensation, which fell to be ascertained under s. 8, sub-s. 1, thereof (1). It was agreed that the full amount of the lump sum was 300*l.* and the full amount of the children's allowance was 228*l.* 12*s.* and the respondent claimed to be entitled to both. Judge Lawson Campbell, sitting at Peterborough county court as an arbitrator under the Workmen's Compensation Act, made an award in the terms of the claim. The Court of Appeal affirmed this decision, and the appellants appealed to the House of Lords.

Sellers K.C. and *W. H. Duckworth* for the appellants. The children's allowance should not have been awarded to the respondent, for the widow, by claiming and recovering a sum under the Fatal Accidents Acts, had lost her right to make a claim under the Workmen's Compensation Act, 1925: s. 29 of that Act. Unless she claims under that Act the condition precedent which is necessary to the payment of the children's allowance is not fulfilled. The words "leaves a "widow" in s. 8, sub-s. 1, should be read as "leaves a widow "who is claiming under this Act." Since the widow is now disqualified from making a claim under the Act, her existence as a dependant must be disregarded to avoid duplication. In assessing the amount of compensation under the Act, the same principles should prevail as in the case of the Fatal Accidents Acts under which one claim only can be made and if persons stand out they stand out for ever: see *Avery* v. *London and North Eastern Ry. Co.* (2). The reason for the provision in s. 8, sub-s. 1, of the Workmen's Compensation Act, of the children's allowance was that it was apparent that the maximum amount represented by the lump sum, which is the

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(1) By s. 8, sub-s. 1, of the Workmen's Compensation Act, 1925: "The compensation under "this Act where death results "from the injury shall be a lump "sum of an amount calculated in "accordance with the rules here-"inafter contained, together with, "if the workman leaves a widow " . . . . wholly or partially de-"pendent upon his earnings, and "in addition leaves one or more "children under the age of fifteen "so dependent, an additional sum "(hereinafter referred to as the "'children's allowance') of an "amount calculated in accordance "with the rules hereinafter con-"tained, so, however, that the "lump sum and children's "allowance (which shall be added "together and dealt with as a "single sum) shall not in any case "exceed in the aggregate six "hundred pounds."

(2) [1938] A. C. 606, 612.

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basic sum, was hardly fair compensation where there were a widow and children, but here the only person who could be entitled to claim compensation under the Workmen's Compensation Act at the time of the assessment of the compensation was the respondent, and, accordingly, he could not be entitled to any "additional sum" in addition to the lump sum. The relevant time to ascertain who are the dependants of the deceased workman is the time when the arbitration is held: see r. 61 of the Workmen's Compensation Rules, 1926, and *Ropner Steamship Co., Ld.* v. *Morgan* (1), and at the time of the arbitration the widow was not a dependant for the purposes of the Act, since she could no longer claim under it. The effect of holding that the additional sum was payable in the present circumstances would be absurd, inconsistent and contrary to the general intention of the Act, to which the court must have regard in interpreting the relevant words of s. 8, sub-s. 1. Since this is not a case where the words are precise and capable of but one construction, the court is not confined to a literal interpretation: Maxwell on "Interpretation of Statutes," 8th ed., pp. 3, 17. A reasonable interpretation of the sub-section would ensure that additional compensation should be paid where there was more than one dependant and would do no injustice to anyone. The interpretation contended for by the respondent would be a complete infringement of s. 29 of the Act, under which employers are not liable to pay compensation both independently of and also under the Act, and would greatly increase the financial responsibilities of employers. The support and maintenance of the widow in the present case has been provided for by a payment by the appellants, and to allow the respondent the additional sum as well as the lump sum would be a duplication. The workman should be regarded as an individual entitled to compensation. He could not obtain compensation both under the Act and independently of it, and his dependants should not be allowed to do so either. [They referred to *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell* (2), *Avery* v. *London and North Eastern Ry. Co.* (3), and *Gill* v. *N. Fortescue & Sons, Ld.* (4)].

Beney for the respondent was not called on to argue.

The House took time for consideration.

(1) [1935] 1 K. B. 1, 11.
(2) [1931] A. C. 575.
(3) [1938] A. C. 606, 616.
(4) (1913) 6 B. W. C. C. 577.

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LONDON BRICK CO. *v.* ROBINSON (AN INFANT).

1942. Dec. 15. VISCOUNT SIMON L.C. My Lords, this appeal brings up to this House one of those difficult cases under the Workmen's Compensation Act, which result from the fact that, when fatal injury, arising out of and in the course of the employment, is caused to a workman, the workman's dependants are not in all cases confined to the remedy and scales of compensation provided under the Act, but may, if the facts warrant it, proceed independently of the Act to enforce any civil liability of the employer, such as that which might arise under the Fatal Accidents Acts, 1846 and 1864, the Employers Liability Act, 1880, or at common law. Remedies against the employer arising independently of the Workmen's Compensation Acts have, ever since the enactment of the first Act in 1897, been expressly preserved as an alternative: see s. 1, sub-s. 2 (*b*), of the Act of 1897; s. 1, sub-s. 2 (*b*), of the Act of 1906; and now s. 29 of the Act of 1925. Each of these sections, while preserving the alternative remedy, if any, goes on "but the employer shall not be liable "to pay compensation for injury to a workman by accident "arising out of and in the course of the employment both "independently of and also under this Act." By s. 48, sub-s. 3, of the Act of 1925: "Any reference to a workman "who has been injured shall, where the workman is dead, "include a reference to his . . . . dependants . . . ." The form of this provision would naturally suggest that it secures the employer against liability to pay compensation in respect of the same accident both under the Act and independently of the Act. In the case of a workman who is injured, but not killed, that plainly is the result. He makes his claim either under the Act or independently of the Act, but he cannot do both. He is protected if he mistakenly supposes that he can recover independently of the Act, and fails to do so, for it is provided that, if it is determined that his employer is not liable to pay damages independently of the Act, but that the employer would have been liable to pay compensation under the Act, the court which is deciding against the former claim may assess the proper compensation under the Act and make the same award (subject to a possible deduction for costs) as would follow from proceedings under the Act: sub-s. 2 of s. 29 of the Act of 1925, formerly sub-s. 4 of s. 1 of the Act of 1897, and sub-s. 4 of s. 1 of the Act of 1906.

So far, there is no difficulty. When, however, owing to the workman's death resulting from the injury, the claim against the employer is made by the workman's dependants, and there are more than one of them, a complication arises which the courts have done their best to straighten out, but which produces consequences which it is difficult to think the legislature had fully in mind. What is to happen if proceedings are taken on behalf of some of the dependants against the employer independently of the Act, and other dependants take proceedings under the Act? This House decided in *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell* (1), that the provision above quoted that the employer "shall not be "liable to pay compensation for injury to a workman by "accident arising out of and in the course of the employment "both independently of and also under this Act," did not mean that the employer cannot in any circumstances be under liability to pay in two independent proceedings. That appeal came from Scotland. The workman's widow, suing for herself and his infant children, had raised an action at common law against the appellants, alleging fault on their part and concluding for damages and solatium. Subsequently, a stepson of the deceased raised proceedings in the sheriff court for recovery of compensation under the Workmen's Compensation Act, and the appellants admitted liability and paid into court the maximum sum for which they could be held liable in workmen's compensation proceedings. The appellants' plea in law in the common law action was that, having paid into the sheriff court the maximum compensation under the Act and not being liable to proceedings independently of the Act, the widow's action was incompetent. This House, affirming the decision of the Second Division of the Court of Session, rejected this plea. That case involved the unusual feature that the stepson could only have claimed under the Act, for he had no right of action at common law, and to decide in favour of the appellants would have been to deny to the widow the option to which the Act referred. Lord Buckmaster said, with reference to the provision that the employer shall not be liable both independently of and also under the Act (2), that this provision "is intended to relate "only to cases where the proceedings are taken by the same "persons and affects only the cases where the workman "proceeding under the statute had the option of proceeding "either under the statute or at common law. The claims of "the widow and children of proceeding at common law cannot

(1) [1931] A. C. 575.

(2) [1931] A.C. 575, 580.

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"be defeated by the act of somebody to whom the common "law remedy is not open." Lord Dunedin thought (1) that the section could not be construed as meaning that all the dependants must act together, and select one form of remedy or the other, for there is no provision as to how this choice is to be exercised if they differ, and he added : "The compensation "to be paid by the employer" under the Act "may be viewed "as a lump sum, and an aggregate of what is actually called a "lump sum, plus a children's allowance if there are such. "But the claim to participate in this lump sum is an individual "claim, and what I think the section means to say, and what "involves no absurdity, is that no individual is to get two "payments, one at common law and the other under the Act." We must take it, therefore, as established law that, though the employer is declared by the statute not to be liable to pay compensation in respect of the same accident both independently of and also under the Workmen's Compensation Act the employer is, nevertheless, liable to pay compensation both independently of and also under the Act if one dependant has only one remedy and another dependant pursues another.

The matter was taken a stage further seven years later by the decision of this House in *Avery* v. *London and North Eastern Ry. Co.* (2). In that case, following on a fatal accident to a workman, the workman's widow claimed damages under the Fatal Accidents Acts and the Employers Liability Act, and the workman's children claimed compensation under the Workmen's Compensation Act. The question was whether the amount which the employers had to pay in either action was reduced by the circumstance that in each case the claim was not the claim of the whole body of the dependants, but only of a part of them. The Court of Appeal had held (3) that since the widow's proceedings must, by virtue of s. 2 of the Fatal Accidents Act, 1846, be taken to have been brought for the benefit of herself and her children, she could only receive her proper share of the total damages as restricted by s. 3 of the Employers Liability Act, 1880, and, similarly, that the children could only receive, in proceedings under the Act, their proper share of the lump sum assessed as compensation under the Act of 1925. This House reversed that decision and decided that, in assessing the damages recoverable by the widow, it was right to ignore the fact that the children were

(1) [1931] A. C. 575, 584.
(2) [1938] A. C. 606.
(3) [1937] 2 K. B. 515.

claiming compensation under the Act, and, similarly, that the amount of compensation that the children would receive would not be affected by the fact that the widow had exercised her option to claim damages independently of the Act. In the course of his opinion in that case, my noble and learned friend Lord Atkin anticipated, without actually deciding, the exact question which we now have to answer. He said (1): "Another problem that was suggested during argument was "whether when the widow was claiming independently she "should be taken into account when assessing the total lump "sum under the provisions of s. 8. I incline to think that "those provisions only relate to dependants who are in fact "claimants, but the matter does not arise in the present case, "and I express no considered opinion about it."

It is this problem which now comes up for decision. The workman who succumbed to his injuries left as his dependants a widow and a son who was an infant in arms. They were both wholly dependent on his earnings. The widow has made a claim against the appellants under the Fatal Accidents Acts which has been satisfied by the payment to her of 1750*l.* The infant respondent by his next friend has made a claim on his own behalf under the Workmen's Compensation Act. Sect. 8 provides that the compensation, where death results from injury, shall be a lump sum, which in the present case is 300*l.*, together with an additional sum, which is referred to as the children's allowance, of an amount calculated in accordance with the Act, which in the present case is 228*l.* 12*s.* These two amounts are to be added together and "dealt with as a "single sum." It is admitted that this infant is entitled to be awarded the 300*l.*, and the dispute is whether the additional sum of 228*l.* 12*s.* also falls to be paid to him.

Sect. 8 provides that this additional sum is to be added to the lump sum "if the workman leaves a widow or other member "of his family (not being a child over the age of fifteen) wholly "or partially dependent upon his earnings, and in addition "leaves one or more children under the age of fifteen so "dependent." Reading these words literally, the condition they prescribe is satisfied. The workman did leave a widow and in addition left a child under fifteen, and they were both dependent wholly on his earnings. The appellants contend that the reference to a widow in the conditional phrase which I have quoted is to a widow who is making a claim under the Act.

(1) [1938] A. C. 606, 616.

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The Court of Appeal felt constrained to reject this argument, notwithstanding Lord Atkin's observation in *Avery* v. *London and North Eastern Ry. Co.* (1), which was, of course, not the concluded view, or even an incidental dictum, of my noble and learned friend, but was merely a speculation thrown out in the course of unravelling a most perplexing matter. The Master of the Rolls, MacKinnon L.J. and Goddard L.J., were fully alive to the strange consequences of rejecting the appellants' contention and the illustrations contained in their judgments do indeed show that results follow which, to me at least, seem surprising. The maximum amount for which the employer could be liable under the Workmen's Compensation Act in the present case, if the widow and the infant child joined in claiming it, would be 528*l.*, which would be distributed between the two dependants in a suitable proportion. If, however, the widow makes her claim independently of the Act and receives 1750*l.* as damages, so that there is now only one dependant to claim under the Act instead of two, the result is that this one dependant now takes the whole sum of 528*l.* in which he otherwise would only be entitled to a share, but I agree with the Court of Appeal (2) that the words which we have to interpret are not in themselves obscure or ambiguous, and there is no justification for construing the phrase "if the workman leaves a widow" as though it ran "if the workman leaves a widow who is claiming "compensation under the Act." The employer's liability in the case of fatal accidents must be calculated according to the language of s. 8. The "lump sum" and the "children's "allowance" constitute a single sum, and that is the amount for which, in the circumstances, the employer is liable in proceedings brought against him under the Act. He has not fully discharged that liability under the Act until he has paid that total sum. The circumstance that, owing to the widow's choice of a different remedy, the only person to receive this total sum is the infant dependant is fortunate for the infant, but does not justify the award to him of less than the total amount for which the appellants are liable under the Act.

I agree with your Lordships in holding that, in view of previous decisions of this House, the House can come to no other conclusion than that which I have indicated, and I move that this appeal be dismissed with costs.

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(1) [1938] A. C. 606, 616.

(2) [1942] 2 K. B. 239, 244.

Lord Atkin. My Lords, I should not have thought it necessary to add any words of my own had it not been that in *Avery* v. *London and North Eastern Ry. Co.* (1), referring to the section now in question, I ventured on a dictum: "I "incline to think that those provisions only relate to dependants "who are in fact claimants, but the matter does not arise in "the present case and I express no considered opinion about it." It was tentative enough, but it was ill-advised, especially in a field where obiter dicta have added enough difficulty to decided cases. Judge Lawson Campbell at Peterborough, having formed his own opinion, very rightly disregarded the dictum. Now that I have had the opportunity of forming a considered opinion, I have no doubt that the learned judge's decision and that of the Court of Appeal were correct for the reasons they have given. The words of the section are clear, and there is no absurdity, inconsistency or repugnance as suggested by the appellants to lead us to disregard the natural meaning of the words. I do not think it necessary to discuss suggested anomalies. It is sufficient to say that it is obvious that there may well exist conditions in which either the widow is not a claimant, or, being a claimant, would be awarded only a small proportion of the lump sum, where the children, if under sixteen, would receive substantially the whole sum increased by the additional allowance. I agree that the appeal should be dismissed.

Lord Thankerton. My Lords, it is not disputed that the respondent is entitled to the whole of the lump sum of 300*l.*, but the dispute arises whether the compensation can include a "children's allowance." The respondent maintains that, inasmuch as the deceased workman left a widow wholly dependent on his earnings, and, in addition, left one child under the age of fifteen so dependent, the children's allowance should be included. The appellant maintains, that, unless the workman's widow is a claimant under the Act, she was not such a widow as is referred to in s. 8, sub-s. 1, of the Act, and the conditions necessary to the inclusion of a children's allowance are not present. The appellant's contention was rejected by the county court judge, and by the Court of Appeal. Accordingly, the only question in the appeal is whether, in these circumstances, a children's allowance falls to be added to the lump sum by virtue of the provisions of s. 8, sub-s. 1,

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(1) [1938] A. C. 606, 616.

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of the Act. The material words in that section are " . . . "together with, if the workman leaves a widow or other "member of his family (not being a child under the age of "fifteen) wholly or partially dependent upon his earnings, and "in addition leaves one or more children under the age of "fifteen so dependent, an additional sum (hereinafter referred "to as the children's allowance) of an amount calculated in "accordance with the rules hereinafter contained, so, however, "that the lump sum and children's allowance (which shall be "added together and dealt with as a single sum) shall not in "any case exceed in the aggregate six hundred pounds."

Counsel for the appellants admitted that his construction required the words "leaves a widow" to be read as meaning "leaves a widow who is claiming under this Act," and the same construction would equally apply to the words "or other "member of his family." I can find no justification for the insertion of the additional words by the court, as the words of the section are clear and unambiguous. In the present case the workman did leave a widow wholly dependent on his earnings, and in addition left one child under the age of fifteen so dependent, thus exactly answering the only conditions expressed in the section.

My view is reinforced by the decisions of this House in *Kinneil Cannel and Coking Coal Co., Ld.* v. *Waddell* (1) and *Avery* v. *London & North Eastern Ry. Co.* (2). By the former case it was authoritatively decided that each dependant of a deceased workman who is entitled to claim compensation under the Workmen's Compensation Act has an individual right, which is not to be affected by the exercise by another dependant of the option as to choice of proceedings allowed by s. 29, sub-s. 1. In the latter decision, it was held that, in assessing damages in the actions brought by the widows independently of the Workmen's Compensation Act, the county court judge was right in ignoring the fact that the children were claiming in respect of the same accident under the Workmen's Compensation Act, and, similarly, in respect of the claims by the children to compensation, he was right to ignore the fact that the widows were claiming damages. This decision directly reversed the view expressed in the Court of Appeal (3) that the exclusion of the widows, owing to their having recovered damages, could not increase the

(1) [1931] A. C. 575.
(2) [1938] A. C. 606.
(3) [1937] 2 K. B. 515, 539.

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sums payable as compensation to the dependants who did claim under the Workmen's Compensation Act. It has to be remembered that the Act nowhere prescribes the amount of compensation to which an individual dependant is to be entitled, nor does it fix a maximum for such a claim. Further, the number of dependants left by a deceased workman did not affect the amount of compensation for which the employer was liable—which was based on the wage paid by the employer—until the children's allowance was introduced by the Workmen's Compensation Act, 1923. The amount of the children's allowance is affected by the number of children under fifteen, though it is still based on the wage paid, but, here again, no part of the children's allowance is reserved for any specific dependant or dependants. On the contrary, the lump sum and the children's allowance are to be added together and dealt with as a single sum. I may add that the existence of a workman's family was ignored in regard to the weekly payments in respect of total or partial incapacity, which were also based on the wage paid, until provision was made by the Workmen's Compensation (Supplementary Allowances) Act, 1940, for a supplementary allowance in respect of each child under fifteen, which is not regulated by the wage paid.

I have made these observations in order to stress the fact that the Act has approached the question of compensation, as introduced in s. 1 of the Act, from the angle of the employer's liability to pay, and the amount of that liability is ascertainable under ss. 8 to 14. Nowhere is the number of dependants claiming, whether they are excluded by virtue of s. 29, sub-s. 1, or fail to claim, made an element in the calculation of the employer's liability. This was recognized by this House in *Avery's* case (1), and I am of opinion that the court has no justification for importing such a qualification as is sought for by the appellants. I, therefore, agree with the course proposed by my noble and learned friend.

Lord Russell of Killowen. My Lords, I agree that this appeal fails and should be dismissed. In my opinion, it cannot succeed in view of the decision of this House in *Avery* v. *London and North Eastern Ry. Co.* (1).

Lord Romer (read by Lord Russell of Killowen). My Lords, having regard to the decision of this House in *Avery's*

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(1) [1938] A. C. 606.

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case (1), I am of opinion that this appeal necessarily fails and should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Barlow, Lyde & Gilbert.*

Solicitors for respondent: *Chamberlain & Co., for Mellows & Sons, Peterborough.*

(1) [1938] A. C. 606.

[HOUSE OF LORDS.]

H. L. (E.)*
1942
Dec. 14, 15.

BEAK (INSPECTOR OF TAXES) . . . . Appellant;

AND

ROBSON . . . . Respondent.

Revenue—Income tax—Manager and director—Separate sum paid in consideration of restrictive covenant—Restrictive covenant not coming into force until after period of employment ended—Separate sum not chargeable to income tax—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. E, r.* 1.

By an agreement dated October 4, 1937, a company agreed to employ the respondent as manager and director for five years at a salary of 2000*l.* a year and bonuses. By cl. 6 the contract was made terminable by either party on six months' notice in writing on or after September 30, 1940. Clause 7 provided for payment of 7000*l.* to the respondent on the execution of the agreement in consideration of his entering into a restrictive covenant contained in cl. 8 which provided that, if the agreement should be determined by notice in writing given by him or by any breach by him of the provisions of the agreement, then from such determination or breach he was not, without the consent of the company, either solely, or jointly with, or as manager or agent for, any other person, persons or company, to carry on or be engaged, concerned or interested in a competing business within fifty miles of N.:—

Held, that the respondent was not assessable to income tax under sch. E in respect of the sum of 7000*l.* which was not a profit arising from the office.

Decision of the Court of Appeal [1942] 2 K. B. 149, affirmed.

Appeal from the Court of Appeal.

By an agreement dated October 4, 1937, the respondent agreed to serve William Mathwin & Son (Newcastle), Ld., a private company, as director and manager. The agreement

**Present:* Viscount Simon L.C., Lord Atkin, Lord Thankerton, Lord Russell of Killowen, and Lord Porter.

recited that he had for some years served the company as a director and manager at a fixed salary with bonuses, that his service was terminable on either side by short notice, and that his services and connexion were important to the goodwill of the business. Clauses 1 to 6 dealt with the terms of his service as director and manager. He was to serve for a term of five years from April 1, 1937 (cl. 1). He was to devote as much of his time to the service of the company as was reasonably necessary to the conduct of its business (cl. 2). During his service he was not to enter into any other business of a similar nature without the previous consent of the board (cl. 3). He was to be paid a salary at the rate of not less than 2000*l.* a year (cl. 4). Provision was made for the payment of bonuses to him out of the company's profits (cl. 5). Either party had a right by six months' notice in writing to terminate the agreement not earlier than September 30, 1940. By cl. 7: "In consideration of the restrictive covenant on the part of "Mr. Robson contained in the next succeeding clause hereof "the company shall on the execution hereof pay to Mr. Robson "the sum of 7000*l.*" By cl. 8: "If this agreement shall be "determined by notice given by Mr. Robson to the company "under cl. 6 hereof or by any breach by him of the provisions "of this agreement then from such determination or breach "until the determination of a period of five years from April 1, "1937, Mr. Robson shall not without the consent in writing of "the company either solely or jointly with or as manager or "agent for any other person, persons or company directly or "indirectly carry on or be engaged, concerned or interested in "the business of coal exporter, coal merchant or shipbroker "within fifty miles of Newcastle-upon-Tyne." The sum of 7000*l.* was paid on the execution of the agreement, and an assessment was made in this sum for the year ending April 5, 1939, under sch. E to the Income Tax Act, 1918 (1). The

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(1) By sch. E of the Income Tax Act, 1918: "Tax under Schedule "E shall be charged in respect of "every public office or employ-"ment of profit . . . ." By r. 1 of the Rules Applicable to Sch. E, as amended by s. 45, sub-s. 1, of the Finance Act, 1927: "Tax "under this Schedule shall be "annually charged on every "person having or exercising an "office or employment of profit "mentioned in this Schedule . . . . "in respect of all salaries, fees, "wages, perquisites or profits "whatsoever therefrom and shall "be computed on the amount of "all such salaries, fees, wages, "perquisites or profits whatsoever "therefrom for the year preceding "the year of assessment . . . ."

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general commissioners for Newcastle decided that the contract of October 4, 1937, was a bona fide contract and that it contained two agreements, the first being an ordinary service agreement, and the second, in cls. 7 and 8, providing for a payment for the giving up of a right wholly unconnected with the respondent's office as director and manager and operative only after he ceased to hold that office. They, therefore, discharged the assessment. Lawrence J. dismissed an appeal by case stated on the ground that the 7000*l.* did not come from having or exercising the office of director and manager but from absence from employment in a certain area after the cessation of the office. The Court of Appeal (Lord Greene M.R., du Parcq L.J. and Lewis J.) affirmed this decision.

Sir Donald Somervell A.-G. and *R. P. Hills* for the Crown. This sum is a profit from the respondent's office and so taxable under the Income Tax Act, 1918, sch. E, r. 1. It was paid to him in his capacity as a director, while he was a director and because he was a director. Thus, it accrued to him by virtue of his office, which is the test: *Herbert* v. *McQuade* (1). The court is dealing with the conditions on which the respondent was given his employment and without which he would not have obtained it, and a sum paid in respect of a condition so imposed is taxable as profits from the office. If the 7000*l.* had been spread over five years and payments of 1400*l.* a year had been expressed to be in consideration of the covenant it could not be said that they were not taxable. To say that anything which binds the holder of an office after his employment has ceased cannot be an incident of his employment is wrong, and, in any event, in the present case the restrictive covenant operates at once and not only after the employment has terminated. The consideration is not the respondent's not competing with the company five years hence, but his giving the promise now. The company is paying for him to serve under that covenant. The sum is paid to secure a more valuable and safe employee who can be informed of confidential matters without risk. All sorts of personal terms, operating both before and after the termination of an employment, are imposed on the holders of office, and these have never before been severed. In managerial agreements it is common to include covenants not to compete after the service is terminated, without allocating any separate consideration. If a sum paid in respect of such a covenant is held not to be taxable, it is an invitation to draw up agreements attributing quite arbitrary sums to similar covenants.

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(1) [1902] 2 K. B. 631.

King K.C. and *J. Charlesworth* for the respondent were not called on to argue.

VISCOUNT SIMON L.C. My Lords, in this case the Crown contends that a payment of 7000*l.* to the respondent by a private company called William Mathwin & Son (Newcastle), Ld., under a written agreement between them dated October 4. 1937, was a profit from the office of director and manager of that company within the meaning of r. 1 applicable to sch. E to the Income Tax Act, 1918. Lord Greene M.R. has indicated the answer to this claim in very clear language. In the agreement before us the obligations flowing from the contract of service and the remuneration to be received by the respondent in respect of that service are entirely separate from the restrictive covenant and the consideration which is given for it. The sum of 7000*l.* is not paid for anything done in performing the services in respect of which he is chargeable under sch. E. The consideration which he has to give under the covenant is to be given not during the period of his employment, but after its termination. He is giving to the company for a sum of 7000*l.* the benefit of a covenant which will only come into effect when the service is concluded. I agree with Lord Greene M.R. in the view (1) that to treat this 7000*l.* as a profit arising from the respondent's office "is to ignore "the real nature of the transaction." It is quite true that, if he had not entered into the agreement to serve as a director and manager, he would not have received 7000*l.*, but that is not the same thing as saying that the 7000*l.* is profit from his office of director so as to attract tax under sch. E. The Attorney-General points out that it is not uncommon in managerial agreements to include a covenant not to compete after the service is terminated without any separate consideration being allocated to the covenant, and it was suggested that a decision in favour of the respondent in this case might involve the apportionment of the remuneration which a manager receives under his agreement between the profit of his office and the price paid to secure the covenant. I propose to say nothing about that, and to decide the present case

(1) [1942] 2 K. B. 149, 152.

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purely on the terms of the agreement of October 4, 1937. That agreement is admitted to be a bona fide contract and, so regarded, the 7000*l.* cannot properly be treated as a profit arising from the respondent's office or employment. I move that the appeal be dismissed with costs to the respondent as between solicitor and client.

LORD ATKIN. My Lords, I agree.

LORD THANKERTON. My Lords, I agree.

LORD RUSSELL OF KILLOWEN. My Lords, I also agree.

LORD PORTER. My Lords, I agree also.

Appeal dismissed.

Solicitor for appellant: *Solicitor of Inland Revenue.*

Solicitors for respondent: *Hyde, Mahon & Pascall, for Wilkinson & Marshall, Newcastle-upon-Tyne.*

F. C.

[PRIVY COUNCIL.]

J. C.*
1943
Feb. 1.

ATTORNEY-GENERAL FOR ALBERTA . APPELLANT;

AND

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . } RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (Alberta)—Debt Adjustment Act—Constitutional validity—Insolvency legislation—Ultra vires provincial legislature—Debt Adjustment Act, Statutes of Alberta, 1937, *c.* 9, *as amended to c.* 42 *of* 1941—*British North America Act,* 1867 (30 *&* 31 *Vict. c.* 3), *s.* 91 (21.).

The Debt Adjustment Act, 1937, of Alberta, as amended to c. 42 of the 1941 Statutes of Alberta, the main purpose of which is to relieve persons resident in the province of Alberta and their estates from an enforceable liability to pay debts incurred before

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**Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD ROMER, and LORD CLAUSON.

July 1, 1936, and in many cases to compel the creditors to accept compositions approved by the Debt Adjustment Board constituted under the Act, is ultra vires the provincial legislature. The Act, which effects its purposes by precluding persons from any access to the courts of Alberta to enforce their rights without the permission of the board, is in pith and substance legislation in relation to insolvency, and as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada under s. 91 (21.) of the British North America Act, 1867, in relation to bankruptcy and insolvency, and also obstructs and interferes with the actual legislation of the Dominion Parliament on those matters. The Act being ultra vires, s. 39 thereof, which, in effect, provides that the Act shall not be so construed as to authorize the doing of anything not within the legislative powers of the province, is inoperative.

Attorney-General for Alberta and Winstanley v. *Atlas Lumber Co., Ld.* [1941] S. C. R. (Can.) 87, and *Attorney-General for British Columbia* v. *Attorney-General for Canada* [1937] A. C. 391, referred to.

Judgment of Supreme Court of Canada [1942] S. C. R. (Can.) 31, affirmed.

APPEAL (No. 20 of 1942), by special leave, by the Attorney-General for Alberta against the decision of the Supreme Court of Canada (December 2, 1941), which answered certain questions concerning the constitutional validity of the Debt Adjustment Act, 1937, of the province of Alberta, as amended by five later Acts. Those questions had been referred to the Supreme Court for hearing and consideration pursuant to s. 55 of the Supreme Court Act (R. S. C., 1927, c. 35) by the Governor-General in Council by an order made on May 19, 1941.

The following material provisions of the Act of 1937, the questions referred to the Supreme Court and their answers, are taken from the judgment of the Judicial Committee. The Act was in four parts, but Part II. had been repealed. There was a preliminary part containing definitions, including one stating that a "'resident debtor' means a person who is a "debtor and who is an actual resident of and personally living "in the province, and includes the personal representative or "representatives, son, daughter, widow or widower, of a "deceased resident debtor, and includes a family corporation "which is a debtor" as therein mentioned. There was also a definition of "resident farmer." In s. 3 there was provision for the constitution of a Debt Adjustment Board, to consist of one, two or three members appointed by the Lieutenant Governor in Council. The powers of the board could be exercised by any single member or by any person designated by the board with the approval of the Lieutenant Governor. Under s. 6 the board had power to make " inquiries . . . . "with regard to the property of any resident debtor or resident "farmer," and might examine the debtor or any other persons under oath and had the same power as a commissioner under "The Public Inquiries Act."

Part I. of the Act began with s. 8 which in its first subsection enacted as follows :—

"8. (1.) Unless the board or any person designated by the "board under the provisions of this Act, issues a permit in "writing giving consent thereto :—(*a*) no action or suit for the "recovery of any money which is recoverable as a liquidated "demand or debt in respect of any claim enforceable by "virtue of any rule of law or equity or by virtue of any statute, "except money payable in respect of rates and taxes payable "pursuant to any statute, and debts owing to a hospital for "hospital services; and (*b*) no proceedings by way of "execution, attachment or garnishment; and (*c*) no action "or proceeding for the sale under or foreclosure of a mortgage "on land, or for cancellation, rescission or specific performance "of an agreement for sale of land or for recovery of possession "of land, whether in court or otherwise; and (*d*) no action "or proceeding to sell land under or in satisfaction of any "judgment or mechanic's lien; and (*e*) no seizure or distress "under an execution or under any lease or any tenancy "howsoever created, lien, chattel mortgage, conditional sale "agreement, crop payment agreement or in attornment as "tenant under any agreement for sale or mortgage, and no sale "or other proceeding thereunder either by virtue of rights of "property at common law or under a statute passed prior "to this Act; (*f*) no proceedings by a lessor, mortgagee, "vendor, or other person claiming possession of a share of "crop in any case where the provisions of The Crop Payments "Act apply; and (*g*) no action respecting such other class of "legal or other proceedings as may be brought within the "provisions of this section by order of the Lieutenant Governor "in Council,—shall be taken, made or continued by any person "whomsoever against a resident debtor in any case." Subsect. 3 provided that the section should not apply to any contract made or entered into by a debtor where the whole of the original consideration for the contract arose on or after July 1, 1936, but should apply to (among other things) any judgment obtained before July 1, 1936. By sub-s. 5: "the "board may at any time in its discretion cancel or suspend "any permit which has been previously issued under the "section by the board." Under s. 9 no permit was to be granted in respect of any proceedings on a mortgage of farmlands or an agreement for sale thereof, if those proceedings led to foreclosure by reason only of the temporary impossibility owing to abnormal depreciation in values of realizing the probable normal value of the security. Under s. 10 a creditor might apply for a permit to commence or continue any action against a resident debtor, and the board in that case must make its proper inquiries, and thereupon might issue a permit, or refuse, or adjourn the application for such period as it thought fit. By s. 11 it was provided that the time during which proceedings were prohibited by the board did not run against the creditor under the Limitation of Actions Act, 1935.

Part III. of the Act related to negotiations for agreements for the adjustment of debts of resident debtors. Sect. 21 provided that any resident debtor, or the creditor of any resident debtor, could by written application call on the board to investigate the resident debtor's financial position, and to endeavour to negotiate an agreement for the settlement of the debtor's debts, either in full or by a composition. The board was to have all the extensive powers of inquiry conferred by the Act. Any agreement between a resident debtor and a creditor made through the agency of the board, however informal, was to be binding (s. 22); and the board (s. 23) was to endeavour to bring about an agreement between the resident debtor and his creditors whereby the secured and unsecured debts of the debtor were reduced to an amount which, in the opinion of the board, was in accordance with the ability of the debtor to pay, either presently or in the future, having regard to the productive capacity of the farm and its equipment and the average net prices of agricultural produce between the date of the debt being incurred and the date of adjustment (see ss. 22 and 23).

Part IV. contained provisions specially applicable to resident farmers. Sect. 26 provided that a resident farmer who was in default on a proposal formulated and confirmed under the Farmers' Creditors Arrangement Act, 1934 (a Federal Act: 1934, S. C., 24-25, Geo. 5, c. 53) could not be proceeded against by his creditor by any of the proceedings set out in s. 8 of the

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Debt Adjustment Act, 1937, unless the board issued a written consent under that section. Sect. 27 provided that a chattel mortgage given by a resident farmer after May 1, 1934, to secure a past debt should be invalid unless approved by the board within sixty days. By s. 28 a resident farmer could be authorized by the board, in order to supply his own necessities or fodder or seed grain, to sell free of encumbrance any goods or chattels subject to a chattel mortgage given by him. By s. 29 a resident farmer who was a lessee of land under a crop share lease might be authorized by the board to retain for his own use crop deliverable to the lessor.

Part V. contained miscellaneous provisions, of which s. 36 was the most noticeable. It provided for an appeal by any person who deemed himself aggrieved by the action of the board in granting or refusing a permit or its other orders " to "a judge of the Supreme Court sitting with a jury of six "persons." Sub-sect. 8 provided that the question as to the action of the board in withholding or granting a permit, or in giving any direction under the Act was to " be a question of "fact for the determination of the jury under proper instruc-"tions from the judge and there shall be no appeal from such "determination or from any judgment or order made thereon." The question of fact was nowhere defined. Sect. 32 provided for the imposition of a penalty, namely, a fine not exceeding two hundred and fifty dollars and, in default of payment, a term of imprisonment with hard labour not exceeding three months, or both, on any person who " wilfully takes or "continues any action or proceeding or makes or continues "any seizure or sells or disposes of a chattel in violation of the "provisions of this Act or the regulations."

The questions referred, and the answers given by the majority of the Supreme Court of Canada (Duff C.J.C., Rinfret, Davis, Kerwin, Hudson and Taschereau JJ.), were as follows: Question 1: Is the Debt Adjustment Act, 1937, being c. 9 of the Statutes of Alberta, 1937, as amended by c. 2 of the Statutes of Alberta, 1937 (3rd session), c. 27 of the Statutes of Alberta, 1938, c. 5 of the Statutes of Alberta, 1938 (2nd session), c. 81 of the Statutes of Alberta, 1939, and c. 42 of the Statutes of Alberta, 1941, ultra vires of the legislature of Alberta, either in whole or in part, and if so, in what particular or particulars or to what extent? Answer: The said Act as amended is ultra vires of the legislature of Alberta in whole.

Question 2: Is the said Act as amended operative in respect of any action or suit for the recovery of moneys alleged to be owing under or in respect of any bill of exchange or promissory note? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 3: Is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit for the recovery of moneys owing under or in respect of any bill of exchange or promissory note? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 4: Is the said Act as amended operative in respect of any action or suit for the recovery of money or interest thereon, or both, not being money or interest alleged to be owing under or in respect of any bill of exchange or promissory note, whether or not such money or interest is secured upon land situated in the said province, in the following cases, namely, where such action or suit is for the recovery of: (*a*) the principal amount of such money and interest, if any, where the same are payable in the said province; (*b*) the principal amount of such money and interest, if any, where the same are payable outside the said province; (*c*) the interest only upon such money? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Question 5: If the answer to any of the parts (*a*), (*b*) and (*c*) of question 4 is in the negative, is the said Act as amended operative in respect of any proceedings taken to enforce any judgment obtained in any action or suit in respect of which such answer is given? Answer: The said Act as amended is not operative in respect of any of the matters mentioned.

Crocket J., who dissented, was of opinion that the Act was not ultra vires or inoperative except in so far as its provisions conflicted with existing valid legislation of the Parliament of Canada.

1942. Nov. 23, 24, 25, 26, 30; Dec. 1, 2, 3. *Barton K.C.* and *Leonard Stone* for the appellant. The Debt Adjustment Act, 1937 (as amended), is in relation to matters coming within the classes of subjects enumerated in the following heads of s. 92 of the British North America Act, 1867, namely, (13.) property and civil rights in the province, (14.) the administration of justice in the province . . . . including procedure in civil matters in those courts, and (16.) matters of a purely

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local or private nature in the province, and it is, therefore, intra vires the provincial legislature. As to (16.), the Act of 1937 was directed to the relief of great local distress: *Union Colliery Co. of British Columbia* v. *Bryden* (1). As to (13.), the right of access to the courts is a "civil right in the "province." The expression "civil rights" is a wide one: *Citizens Insurance Co. of Canada* v. *Parsons* (2). As to (14.), so far, at any rate, as the Act affects execution and ordinary processes it is procedural. It is in the nature of a statute of limitation, and such a statute has always been held to be procedure: *Her Highness Ruckmaboye* v. *Lulloobhoy Mottichund* (3). [See also *Reg.* v. *Bush* (4); *Reference re Authority to Perform Functions Vested by the Adoption Act, etc.* (5); *Maley* v. *Cadwell* (6); *Beiswanger* v. *Swift Current City* (7); *Attorney-General for Ontario* v. *Attorney-General for Canada* (8); and *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (9).] The provincial legislature has power to destroy an individual cause of action, or to bar the courts to that cause of action. This, therefore, is legislation regarding civil rights and procedure, and it must also be regarded as an emergency measure forced on the province by necessity. It is agreed that every provincial power is limited by s. 91 of the British North America Act, but the Act of 1937 is intra vires unless it can be shown that it infringes some head of s. 91. [*Canadian Pacific Ry.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (10); *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (11); *In re the Regulation and Control of Radio Communication in Canada* (12); *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (13); *Attorney-General for Ontario* v. *Attorney-General for Canada* (8); and *Grand Trunk Ry. of Canada* v. *Attorney-General for Canada* (14), were referred to on the construction of ss. 91 and 92 of the North America Act.] The respondents say that the Act of 1937 invades the field of bankruptcy and

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(1) [1899] A. C. 580, 584.
(2) (1881) 7 App. Cas. 96, 110.
(3) (1852) 8 Moo. P. C. 4, 35.
(4) (1888) 15 O. R. 398, 403.
(5) [1938] S. C. R. (Can.) 398, 406.
(6) [1934] 1 W. W. R. 51, 56.
(7) [1930] 3 W. W. R. 519, 520-521.
(8) [1894] A. C. 189, 198.
(9) [1940] A. C. 513, 538.
(10) [1899] A. C. 367, 372.
(11) [1902] A. C. 73, 78.
(12) [1932] A. C. 304, 308, 323-326.
(13) [1892] A. C. 437.
(14) [1907] A. C. 65, 68.

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insolvency, a subject-matter within the exclusive legislative power of the Dominion under s. 91 (21.), but voluntary compositions do not necessarily fall within the definition of bankruptcy and insolvency. They are part of the open territory which may be entered by either Dominion or province. [*Attorney-General for British Columbia* v. *Attorney-General for Canada* (1) was cited.] Nothing in the Act of 1937 deals with bankruptcy, purports to do so, or prevents the Dominion Bankruptcy Act from operating. There is no inconsistency: *Ladore* v. *Bennett* (2). Also, the Act of 1937 in no way conflicts with the Farmers' Creditors Arrangement Act, 1934 (a Dominion Act), for that legislation only occupies one part of the field, that covered by compulsory compositions, and does not deal with voluntary compositions. With regard to the Dominion Bills of Exchange Act, R. S. C. 1927, c. 16; the material provisions of that Act merely fix the legal incidents of a bill, and do not affect the method by which it shall be enforced. There is no word which touches on the procedure or affects procedural matters. [Reference was made to the *Winstanley* case (3)]. Again, the Act of 1937 in no way conflicts with the Dominion Interest Act, R. S. C. 1927, c. 102, which merely allows freedom of contract with regard to interest. The Act of 1937 only affects interest incidentally. There are a number of Dominion Acts giving powers to loan and trust companies, e.g., An Act Respecting Loan Companies, R. S. C. 1927, c. 28, and it is alleged by the respondents that the Act of 1937 in some way conflicts with those Acts and is thus rendered incompetent. All those Acts, however, merely clothe the companies with capacity, and, therefore, their powers must be read as powers to do the things permitted subject to the regulations in force as to those particular matters in the province at the time. It is further said by the respondents that the Act of 1937 is invalid because it has an extra-territorial effect, but it only deals with proceedings within the province of Alberta, and it is no objection to such an Act that it may incidentally have an extra-territorial effect: *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (4); *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (5). With regard to severability, if necessary, the proper course would be to declare the Act of 1937 invalid in so far as it may be held to conflict with a Dominion Act: *Winstanley's* case (1) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2).

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(1) [1937] A. C. 391.
(2) [1939] A. C. 468, 480-482.
(3) [1941] S. C. R. (Can.) 87, 91.
(4) [1902] A. C. 73, 79.
(5) [1920] A. C. 184, 189.

J. W. Estey K.C. (A.-G. for Saskatchewan) and *F. W. Wallace*, for the Attorney-General of Saskatchewan, in support of the appeal. This legislation was dictated by the abnormal economic conditions, and was intra vires the provincial legislature as falling within the British North America Act under s. 92 (16.): "Generally all matters of a merely local or "private nature in the province": [*Eddy* v. *Stewart* (3); *Korpan* v. *Supynuk* (4); and *St. James* v. *Bourke* (5).] A mere incidental encroachment on some field which is solely intra vires the Dominion will not invalidate the Act of 1937. The only head of s. 91 under which the Dominion government could step in would be "bankruptcy and insolvency." That, however, is a type of legislation which applies at all times, normal and otherwise, and s. 91 (21.) was never intended to apply when a community was passing through a period of famine: *Ladore* v. *Bennett* (6); *Day* v. *City of Victoria* (7); and *Attorney-General for Manitoba* v. *Manitoba Licence Holders' Association* (8). The pooling and distribution of the assets of a debtor are the essentials of bankruptcy. This is not bankruptcy legislation because the board may deal with one debt only. Further, the board cannot exercise compulsion: *L'Union St. Jacques de Montreal* v. *Belisle* (9); *Attorney-General for Ontario* v. *Attorney-General for Canada* (10); *Ladore* v. *Bennett* (6). The Dominion government could not have passed the Act of 1937. If this legislation is procedural in character, it comes within the provincial jurisdiction under s. 92 (14.): *Eddy* v. *Stewart* (11); *Maley* v. *Cadwell* (12); *Workmen's Compensation Board* v. *Canadian Pacific Ry. Co.* (13); and *Royal Bank of Canada* v. *Workmen's Compensation Board of Nova Scotia* (14). The *Winstanley* decision (1) is based on the construction of s. 74 of the Bills of Exchange Act, and the Supreme Court read the words, rights and powers to sue, as the right to sue in a procedural sense. It is suggested

(1) [1941] S. C. R. (Can.) 87.
(2) [1937] A. C. 377, 388.
(3) [1932] 2 W. W. R. 699, 703.
(4) [1939] 1 W. W. R. 45, 47.
(5) [1938] 3 D. L. R. 287, 288.
(6) [1939] A. C. 468, 480-482.
(7) [1938] 3 W. W. R. 161.
(8) [1902] A. C. 73, 79.
(9) (1874) L. R. 6 P. C. 31, 38.
(10) [1894] A. C. 189.
(11) [1932] 3 W. W. R. 71, 73.
(12) [1934] 1 W. W. R. 51.
(13) [1920] A. C. 184.
(14) [1936] S. C. R. (Can.) 560.

that the history of that sense is indicated in *Goodwin* v. *Robarts* (1), and is merely substantive and not procedural. [Reference was also made to *Catellier* v. *Belanger* (2).] Further, it is a matter of procedure by analogy with the Statute of Limitations, the Statute of Frauds and the Evidence Act. Where the Dominion does not specifically provide a procedure it is the provincial procedure which obtains. [*In re Sharp* (3), *Great West Saddlery Co.* v. *The King* (4), *Lymburn* v. *Mayland* (5), *Citizens Insurance Co. of Canada* v. *Parsons* (6), *Mahant Singh* v. *U Ba Yi* (7), and *Mutual Life Assurance Co.* v. *Levitt and Marks* (8) were cited.]

Charles Romer K.C. and *Leonard Stone* for the Attorneys-General for Ontario and Manitoba, intervenants, and *F. W. Wallace*, for the Attorney-General for New Brunswick, intervenant, adopted the foregoing arguments.

Pritt K.C. and *Gahan* for the Attorney-General for Canada. The Act of 1937 does not come under heads (13.), (14.) or (16.) of s. 92, but in pith and substance it deals either with bankruptcy and insolvency (s. 91 (21.)), or with the regulation of trade and commerce (s. 91 (2.)). Unless the Act can be brought squarely within some head of s. 92 the province cannot pass it : *Citizens Insurance Co. of Canada* v. *Parsons* (9). Its subject-matter is not "civil rights" (s. 92 (13.)), as limited in the light of the following authorities, because it is bankruptcy and insolvency or the regulation of trade and commerce : *John Deere Plow Co., Ld.* v. *Wharton* (10) ; *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (11) ; and *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (12). There are a large number of Dominion civil rights which derive from the powers of legislation covered by s. 91, and since the Act of 1937 embraces quite impartially civil rights within and without the province it is not dealing with civil rights within the province. The provincial legislature cannot so legislate as to withdraw from the control of the provincial courts any Dominion civil right : *Electrical Development Co. of Ontario* v. *Attorney-General for Ontario* (13), *Ottawa Valley*

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(1) (1875) L. R. 10 Ex. 337, 349.
(2) [1924] S. C. R. (Can.) 436.
(3) (1896) 5 B. C. Rep. 117.
(4) [1921] 2 A. C. 91.
(5) [1932] A. C. 318.
(6) (1881) 7 App. Cas. 96.
(7) [1939] A. C. 601.
(8) [1939] 1 W. W. R. 530.
(9) 7 App. Cas. 96, 109.
(10) [1915] A. C. 330, 337-340.
(11) [1898] A. C. 700, 715.
(12) [1931] A. C. 310, 326-327.
(13) [1919] A. C. 687.

Power Co. v. *Hydro-Electric Power Commission* (1). Emergency enlarges the rights of the Dominion, and, therefore, reduces those of the province: *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press Co.* (2). The Act of 1937 cannot come within s. 92 (14.), for looked at in form, let alone substance, it has nothing to do with procedure in the Supreme Court of Alberta, and it is not any part of the administration of justice outside procedure. With regard to s. 92 (16.), this matter can hardly be of a merely local nature when it affects to exactly the same extent creditors who have no connexion with the province and those who are Albertian people in every sense, and affects equally rights arising outside the province under Dominion legislation and those arising inside the province under provincial legislation. This statute comes within "bankruptcy and insolvency" (s. 91 (21.)). Insolvency is wider than bankruptcy. Schemes to deal with insolvency, to prevent people becoming bankrupt, and to prevent an insolvent being sued, are all fairly within the description of insolvency, and are none the less so because the insolvency legislated for has resulted from what may be called an emergency due to natural causes: *L'Union St. Jacques de Montreal* v. *Belisle* (3); *Attorney-General for Ontario* v. *Attorney-General for Canada* (4); *Royal Bank of Canada* v. *Larue* (5); *Reference re Companies' Creditors Arrangement Act* (6); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (7). Also, having regard to the sweeping way in which the Act of 1937 enables interference with the ordinary enforcement of obligations, it falls within the regulation of trade and commerce (s. 91 (2.)).

C. F. H. Carson K.C. for the Canadian Bankers' Association and the Mortgage Loans Association of Alberta. While the province may suggest that the reason for this legislation was the prevailing distressed condition, nevertheless it cannot stand if, when the Act is examined, it is found that the province has imperilled and, in effect, rendered nugatory the exclusive legislative authority of the Dominion over certain subjects assigned to it: *Attorney-General for Ontario* v. *Reciprocal Insurers* (8); *Attorney-General for Alberta* v. *Attorney-General*

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(1) [1937] O. R. 265, 333.

(2) [1923] A. C. 695.

(3) L. R. 6 P. C. 31, 36.

(4) [1894] A. C. 189, 200.

(5) [1928] A. C. 187, 196-197.

(6) [1934] S. C. R. (Can.) 659, 660.

(7) [1937] A. C. 391, 396.

(8) [1924] A. C. 328, 337.

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for Canada (1); *John Deere Plow Co., Ld.* v. *Wharton* (2); and *Lukey* v. *Ruthenian Farmers' Elevator Co., Ld.* (3). The Act of 1937 makes no exception with regard to chartered banks, insurance or loan or trust companies, or any other corporation which derives its capacities and powers from Dominion legislation, and, so far as such corporations are concerned, the Act of 1937 conflicts with the Interest Act, R. S. C. 1927, c. 102. If, to accomplish their purpose, the provincial legislature deals with the banking business of Canada, commerce, bills of exchange and promissory notes, and interest, they have touched on so many of the matters specified in s. 91 that the legislation cannot be said in its pith and substance to fall exclusively into a category of s. 92. It is clear that under the Act of 1937 Dominion insurance companies cannot sue an Alberta debtor, notwithstanding the powers conferred on them by Dominion legislation. They are left entirely in the hands of the board. The Act of 1937 has the effect of imperilling the status and essential capacities of banks and companies under Dominion Acts whose solvency depends on their obligations being enforceable. The province cannot pass legislation which has the effect of depriving Dominion companies of the status and powers conferred on them by the Parliament of Canada: *Great West Saddlery Co.* v. *The King* (4); *Lukey* v. *Ruthenian Farmers' Elevator Co., Ld.* (3); *Attorney-General for Manitoba* v. *Attorney-General for Canada* (5); and, in the case of a Dominion company, the power to sue is a necessary inherent constitutional power by virtue of s. 30 of the Interpretation Act, R. S. C. 1927, c. 1. In effect, the Act of 1937 enacts that the provincial courts are not to give effect to certain Dominion civil rights: *Board* v. *Board* (6). When ss. 91 and 92 of the British North America Act are read together, the division of legislative jurisdiction discloses a definite scheme for an efficient federal economic system, and it is a proper test of legislation to inquire whether in its real essence it would have the effect of undermining the foundation of the national economic system. As to the suggestion that this legislation is justified by head (16.) of s. 92, as being purely local and private, the validity of legislation is not to be tested by the reason for an Act, but by its true character and its necessary

(1) [1939] A. C. 117, 128-129.
(2) [1915] A. C. 330, 340.
(3) [1924] S. C. R. (Can.) 56, 71.
(4) [1921] 2 A. C. 91, 100-123.
(5) [1929] A. C. 260, 263-267.
(6) [1919] A. C. 956, 962.

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effect: *Union Colliery Co. of British Columbia* v. *Bryden* (1).

Barton K.C. replied.

1943. Feb. 1. The judgment of their Lordships was delivered by VISCOUNT MAUGHAM, who stated the sections of the Act of 1937, and the questions referred as answered, and continued: Distress of a very serious nature was rife in Alberta and the adjoining prairie provinces from, at any rate, the year 1920, and divers statutes were passed in those provinces, and, in particular, in Alberta, directed to the relief of the inhabitants. In the view their Lordships have taken, it does not seem to be necessary to give even a summary of these statutes beginning with the Drought Area Relief Act (c. 43 of 1922). The Act now under consideration (to be hereafter generally referred to as "the Act") is the last of a series of legislative attempts to relieve the distress of resident farmers and others while keeping within the legislative powers of the province as laid down in the British North America Act, 1867, as amended. Their Lordships approach the important questions before them on the assumption that there was sufficient and, it may be said, grave need for legislation for the relief of distress in the province. They desire, however, to point out that the question before them is not as to the expediency, still less as to the wisdom, of the present Act. The question is simply one as to the power of the province to pass it. If the answer should be in the negative it must necessarily follow that the Dominion has full power to pass a statute dealing with the matter, or such part of it as is beyond the power of the province. It should be mentioned that the Act contains amendments designed to deal with the objection that a preceding Act encroached on the matter of "bankruptcy and "insolvency" which (under s. 91 (21.) of the British North America Act) is within the exclusive legislative authority of the Parliament of Canada. O'Connor J. had decided in favour of this objection: *North American Life Assurance Co.* v. *McLean* (2). Certain compulsory composition provisions mentioned by the learned judge are now removed, but the important provisions of s. 8 remain. The consideration of the Act (as it now stands) came before the Supreme Court of Canada in 1940 in *Winstanley's* case: *Attorney-General for*

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(1) [1899] A. C. 580, 587-588. (2) [1941] 1 W. W. R. 430.

Alberta v. *Atlas Lumber Co., Ld.* (1). This was an action brought without "a permit" under the Act against a resident debtor in Alberta on a promissory note. It was there held (the judgment of Duff C.J. being concurred in by Rinfret, Crocket, Davis, Kerwin, Hudson and Taschereau JJ., affirming the judgment of Ewing J.) that s. 8 (*a*) of the Act, so far as it extends to actions on bills of exchange and promissory notes, is repugnant to the enactments of the Dominion in the Bills of Exchange Act (R. S. C. 1927, c. 16, and amendments thereto), and that the absence of a permit to bring the action was therefore not a defence.

The Act is now under consideration in a proceeding which involves its validity as a whole. The contention on behalf of the appellant was that the Act was concerned only with matters coming within the classes of subjects enumerated in the following heads of s. 92 of the British North America Act, namely: "(13.) Property and civil rights in the "province." "(14.) The administration of justice in the "province, including the constitution, maintenance, and "organization of provincial courts, both of civil and of "criminal jurisdiction, and including procedure in civil matters "in those courts." "(16.) Generally all matters of a merely "local or private nature in the province." The contentions of the respondents, the Attorney-General for Canada, the Canadian Bankers' Association and the Mortgage Loans Association of Alberta, which ranged over a wide ground may be stated thus: First, a denial of the contention that the Act was within any of these heads; secondly, an argument that the Act is legislation within the words "bankruptcy and "insolvency" in s. 91 (21.) of the British North America Act; thirdly, a claim that the Act is legislation in relation to various other subjects enumerated in s. 91 and affects (inter alia) the regulation of trade and commerce, bills of exchange and promissory notes, interest, and the status of banks and companies incorporated under the authority of the Parliament of Canada, and, fourthly, that the Act is in conflict with a number of Acts validly enacted by the Parliament of Canada.

In the view of their Lordships, there is no need, at any rate on this occasion, for any new statement as to the true construction of the British North America Act. The main propositions are now well established, and are re-stated here mainly as a matter of convenience. It is well settled that in

(1) [1941] S. C. R. (Can.) 87.

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case of conflict between the enumerated heads of s. 91 and the heads of s. 92 the former must prevail. The words in s. 91, and particularly the emphatic sentence: "and for greater "certainty, but not so as to restrict the generality of the "foregoing terms of this section, it is hereby declared that "(notwithstanding anything in this Act) the exclusive "legislative authority of the Parliament of Canada extends to "all matters coming within the classes of subjects next here-"inafter enumerated" must be given their natural effect. The final words of the section inserted from abundant caution were these: "and any matter coming within any of the "classes of subjects enumerated in this section shall not be "deemed to come within the class of matters of a local or "private nature comprised in the enumeration of the classes of "subjects by this Act assigned exclusively to the legislatures "of the provinces." It follows that legislation coming in pith and substance within one of the classes specially enumerated in s. 91 is beyond the legislative competence of the provincial legislatures under s. 92. In such a case it is immaterial whether the Dominion has or has not dealt with the subject by legislation, or to use other well-known words, whether that legislative field has or has not been occupied by the legislation of the Dominion Parliament. The Dominion has been given *exclusive* legislative authority as to "all matters "coming within the classes of subjects" enumerated under 29 heads, and the contention that, unless and until the Dominion Parliament legislates on any such matter, the provinces are competent to legislate is, therefore, unsound: *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (1). There were, however, cases in which matters which were only incidental or ancillary to the main subject which was within the exclusive legislative powers of the Dominion Parliament were dealt with by the provincial legislation in the absence of Dominion legislation. Since 1894 it has been a settled proposition that, if a subject of legislation by the province is only incidental or ancillary to one of the classes of subjects enumerated in s. 91, and is properly within one of the subjects enumerated in s. 92, then legislation by the province is competent unless and until the Dominion Parliament chooses to occupy the field by legislation: *Attorney-General for Ontario* v. *Attorney-General for Canada* (2). It is this proposition which, from the nature of the case, too

(1) [1898] A. C. 700, 715.

(2) [1894] A. C. 189.

often leads to difficulty. Legislation since 1867 has assumed many forms in dealing with the greater complexity of modern trade and civilization. It is sometimes difficult to determine whether a particular matter, the subject of a provincial Act, is in "pith and substance" within one of the enumerated heads of s. 91, or whether it is merely ancillary or incidental to one of the subjects there enumerated. This may raise questions as to the precise meaning to be attached to one or more of the enumerated heads of s. 91 and s. 92, and, finally, there may be a doubt whether the legislative field is or is not clear. It must not be forgotten that where the subject-matter of any legislation is not within any of the enumerated heads either of s. 91 or of s. 92, the sole power rests with the Dominion under the preliminary words of s. 91, relative to "laws for the peace, order, and good government of Canada."

Their Lordships propose now to consider the contention that the Act in its main character and object constitutes an attempt to legislate in relation to "bankruptcy and insolvency," the twenty-first head of subjects in s. 91. Some observations may usefully be made on the meaning of the words "bank-"ruptcy and insolvency." Bankruptcy in England is a creature of the legislature, and at the date of the British North America Act (and until 1869) was available only for traders. The only relief afforded to non-traders was provided by divers Acts "for the relief of insolvent debtors." The common law, it should be remembered, permitted debtors who could not pay their debts to be committed to prison by any creditor, and the State assumed no liability to keep them from starvation. That was assumed to be left to the benevolence of any creditor who had caused the imprisonment: see Holdsworth, History of English Law, vol. viii., pp. 229 et seq. When a debtor was in difficulties there was generally an unseemly race by creditors to obtain a first charge on his property by obtaining judgments and executions. It was obviously necessary in any legislative effort to introduce a little humanity into the matter in dealing both with traders who had committed defined acts of bankruptcy and with other insolvent debtors, that is to say, all persons who were unable to pay their debts and obligations as they became due. This circumstance had been recognized in England before the passing of the British North America Act. In 1867 the statutory law of bankruptcy in England depended on the Bankruptcy Law Consolidation Act, 1849, as amended by the Bankruptcy Act, 1861, of which the full title was "An Act "to amend the law relative to bankruptcy and insolvency in "England." The collocation of the two words may be noted. Like all subsequent Acts of the same nature, the Act of 1849, as amended, aimed in substance at two things, justice to the creditors as a body and some measure of consideration to the debtor. The latter's property (speaking generally) was taken from him on adjudication and vested in trustees for the benefit (subject to certain exceptions which need not be here mentioned) of all the creditors. The bankruptcy court had large powers of examining the debtor as to his affairs. If he had acted without dishonesty and certain kinds of impropriety he would ultimately get his discharge. During the proceedings he was protected from arrest and vexatious litigation by his creditors. After obtaining his discharge he would be free from his previous liabilities (with certain exceptions) and could start in business again. The Act of 1861 also made certain provisions for non-traders and elaborate provision for the suspension of bankruptcy proceedings and for substituting a deed of arrangement, subject to the approval and under the control of the court, and, further, it enabled creditors to wind up a debtor's estate under a deed of composition subject to the jurisdiction of the court without taking any proceedings in bankruptcy at all: Bankruptcy Act, 1861, ss. 185 to 200. After the notice of the filing and registration of such a deed no process against the property or person of the debtor was permitted without leave of the court. The previous Acts "for the relief of insolvent debtors" were repealed: s. 230. It is manifest from a perusal of the Acts mentioned that they were passed on the assumption that the debts due to the creditors were enforceable by action and execution against the debtor and his property. That fact was one of the main reasons for the Act of 1861. Imprisonment for debt was in full operation in England: see ss. 98 to 107 of the Act of 1861. The law as to imprisonment for debt was amended by the Debtors Act, 1869. In England it has always been held that, subject to the statutory exception as to debts payable at some certain future time, the petitioning creditor's debt and the debts provable must be debts recoverable by legal process. For example, a debt barred by the Statute of Limitations is not a debt on which a bankruptcy petition can be presented, nor is it one provable in bankruptcy: see Halsbury's Laws of England, 2nd ed., vol. ii., pp. 59 and 268.

The Dominion Act is very similar to the English Bankruptcy Acts so far as those matters are concerned, and there appears to be no reason for thinking that a similar principle would not be applied in Canada to the words " debt due." It should be added that in the *usual* case of a moratorium proclamation the debts become payable at a certain fixed time, and, therefore, such debts are not within the above mentioned principle : *In re Sahler* (1). In the Dominion of Canada there was no general Bankruptcy Act until 1919 (Bankruptcy Act, 1919, c. 36). The existing law in the Dominion is to be found in R. S. C. 1927, c. 11, as amended by 21-22 Geo. 5, c. 17 and c. 18 ; and 22-23 Geo. 5, c. 39. This legislation relates both to bankruptcy and insolvency, that is, it contains provisions for vesting the property of debtors in trustees (a cessio bonorum as it is sometimes called), and also for assignments and compositions by insolvent debtors without bankruptcy. It is, however, provided that Part I. of the Act as amended, dealing with acts of bankruptcy, bankruptcy petitions and receiving orders, is not to apply " to wage-earners or to persons engaged "solely in farming or the tillage of the soil."

In 1934 an Act entitled " The Farmers' Creditors Arrange-"ment Act, 1934," was passed by the Parliament of Canada. It is stated that it shall be read and construed as one with the Bankruptcy Act, and it provides elaborate provisions for compositions and schemes of arrangement by farmers unable to meet their liabilities as they become due. The proposals for such compositions or schemes have to come from the farmers and to be approved by the court. Powers in relation to proposals were given to " Boards of Review " not very unlike those given to the board under Parts III. and IV. of the present Act. The validity of this Act was challenged in a proceeding instituted by the Attorney-General for British Columbia, and there was an appeal from the judgment of the Supreme Court of Canada to the Privy Council : *Attorney-General for British Columbia* v. *Attorney-General for Canada* (2). The judgment of the board, delivered by Lord Thankerton, contains a full statement of the main provisions of the Act there in question. The board, affirming the decision of the Supreme Court of Canada, held that the Act was intra vires of the Dominion Parliament under s. 91 (21.). The following passage in the judgment is material to the present appeal : " Their "Lordships are unable to hold that the statutory conditions

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(1) (1915) 84 L. J. (K. B.) 1275. (2) [1937] A. C. 391.

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"of insolvency which enabled a creditor or the debtor to "invoke the aid of the bankruptcy laws, or the classes to "which these laws applied, were intended to be stereotyped "under head 21 of s. 91 of the British North America Act "so as to confine the jurisdiction of the Parliament of Canada "to the legislative provisions then existing as regards these "matters. Further, it cannot be maintained that legislative "provision as to compositions, by which bankruptcy is avoided, "but which assumes insolvency, is not properly within the "sphere of bankruptcy legislation" (1).

In the opinion of their Lordships there can be no doubt as to the pith and substance of the Act. It is legislation in relation to insolvency, that is, in relation to a class of subject within the exclusive legislative authority of the Parliament of Canada. Its plain purpose is to relieve persons resident in the province, and their estates, from an enforceable liability to pay debts incurred before July 1, 1936, and in many cases to compel the creditors to accept compositions approved by the board. This is effected by precluding persons from any access to the courts of Alberta to enforce their rights against any persons resident in the province without the permission of the board, which may never be obtained. It, no doubt, does not for all purposes destroy the rights of the creditors, but it deprives them of the remedies by which alone in the vast majority of cases those rights can be enforced. If judgments in respect of the debts in question have already been obtained it precludes or stays any proceedings by way of execution, attachment, or garnishment unless the permit of the board has been obtained. Proceedings to enforce mortgages, or other similar or analogous legal proceedings in relation to the recovery of land, are subject to the same restriction. The debts or liquidated demands may have been incurred outside the province. It is plain from many sections of the Act (e.g., ss. 6, 8, 9, 21, 23, 26 and 28) that its main purpose is to relieve resident debtors where they are unable to pay their debts as they become due. On the other hand, the board has the duty on the application of a resident debtor, or any creditor of such a person, to "endeavour to bring about an amicable arrange-"ment for the payment of the resident debtor's indebtedness," and to effect a settlement either in full or by a composition; and the proposed settlement is to be one by which the debts, secured or unsecured, are reduced to an amount which is in

(1) [1937] A. C. 391, 402-403.

accordance with the ability of the debtor to pay presently or in the future. The board clearly has power to refuse any permit to a creditor who does not accept the settlement suggested by the board. Their Lordships agree with the Supreme Court that it is impossible to escape the conclusion that Part III. of the Act contemplates the use of the board's powers under s. 8 to enable it to secure by a method amounting to compulsion the consent of the parties to the proposed arrangement. Their Lordships also agree with the opinion expressed by the Supreme Court that, as regards debts where the creditor and the debtor reside in the province and the debt is payable in the province, the creditor is deprived of his right to present a bankruptcy petition under the (Dominion) Bankruptcy Act. For the reasons already given, fortified by a consideration of all the relevant sections in that Act, it must be held that in respect of an obligation to which the Act (of 1937) applies there is no " debt owing " to the creditor within the meaning of s. 4 of the Bankruptcy Act. It is not immaterial to note that the Act would be practically useless if, on its true construction, it had the result of leaving any creditor or creditors with a debt or aggregate debts amounting to five hundred dollars at liberty to present a bankruptcy petition. In their Lordships opinion, the Act of 1937 seriously interferes with the existing legislation of the Dominion.

On these grounds their Lordships have come to the conclusion, in agreement with the Supreme Court, on the one hand, that the Act as a whole constitutes a serious and substantial invasion of the exclusive legislative powers of the Parliament of Canada in relation to bankruptcy and insolvency, and, on the other hand, that it obstructs and interferes with the actual legislation of that Parliament on those matters. Moreover, if some of the less important provisions contained in the Act were to be regarded as merely ancillary to general Acts relating to bankruptcy and insolvency, such as those already referred to, that conclusion would not avail the appellant since, in their Lordships' view, the ancillary matters must be regarded as being within the domain of bankruptcy and insolvency, and the provincial legislature is precluded from entering into that now occupied field : *Royal Bank of Canada* v. *Larue* (1).

Having arrived at this conclusion, it would not be in accordance with the practice of the Board for their Lordships

(1) [1928] A. C. 187.

to express their opinions on the other important matters discussed and decided in the judgment of Duff C.J., concurred in by Rinfret, Davis, Kerwin, Hudson and Taschereau JJ. On these matters their Lordships think it right to express no opinion, and they desire to adopt the observations of Lord Sumner in delivering the judgment of the board in *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) as to the difficulties in which the provincial legislatures find themselves in matters like this, and the desire of their Lordships not to appear to say anything which might restrict their authority in any case distinguishable from the present. It should be mentioned that an argument was based on s. 39 of the Act. It is there said, in effect, that the provisions of the Act shall not be so construed as to authorize the doing of anything not within the legislative powers of the province. The section cannot, in this case at least, assist the appellant. If apart from s. 39 the Act is ultra vires it must be construed and treated as such; it remains a nullity, and the section is plainly inoperative. Their lordships' attention was called to the fact that a result of the Act's total invalidity would be that the protection afforded by s. 11 would disappear, and that rights which, in view of the Act, had not been enforced might have become time-barred. The hardship and injustice of such a result are undeniable, but they can only be avoided by an Act of the legislative assembly of the province of Alberta.

In the result, the appeal fails, and their Lordships will humbly advise His Majesty that it should be dismissed, without costs, and that the opinion of the Supreme Court should be affirmed.

Solicitors for appellant, for Attorney-General for Saskatchewan, and for the intervenants, Attorneys-General for Manitoba, Ontario and New Brunswick: *Blake & Redden.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for Canadian Bankers' Association and the Mortgage Loans Association of Alberta: *Lawrence Jones & Co.*

(1) [1929] A. C. 260.

[HOUSE OF LORDS.]

LATILLA . . . . APPELLANT ; H. L. (E.)*

AND 1942

INLAND REVENUE COMMISSIONERS . RESPONDENTS. *Dec.* 8, 9, 10 ;

1943 *Feb.* 11.

Revenue—Income tax—Avoidance of liability to taxation—Transfer of assets to company abroad—Income enjoyed by residents in United Kingdom—Income "payable" to company by virtue of transfer—Inclusion of partnership profits—Finance Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 34), *s.* 18, *sub-s.* 1.

By s. 18 of the Finance Act, 1936: "For the purpose of preventing the avoiding by individuals ordinarily resident in the United Kingdom of liability to income tax by means of transfers of assets by virtue or in consequence whereof, either alone or in conjunction with associated operations, income becomes payable to persons resident or domiciled out of the United Kingdom, it is hereby enacted as follows: (1.) Where such an individual has by means of any such transfer, either alone or in conjunction with associated operations, acquired any rights by virtue of which he has, within the meaning of this section, power to enjoy, whether forthwith or in the future, any income of a person resident or domiciled out of the United Kingdom which, if it were income of that individual received by him in the United Kingdom, would be chargeable to income tax by deduction or otherwise, that income shall, whether it would or would not have been chargeable to income tax apart from the provisions of this section, be deemed to be income of that individual for all the purposes of the Income Tax Acts."

By an agreement executed in 1933 four Englishwomen resident in England, one of whom was the wife of the appellant, sold to a company which was formed and registered under the laws of Rhodesia, a two-thirds share in a partnership in a mining enterprise situated there. The remaining one-third share was vested in M., a resident in Rhodesia, who carried on the enterprise in partnership with the company. By the agreement the two-thirds share of the women was transferred to the company in consideration of 10,000 shares of 1*l.* each and 250,000 non-interest-bearing debentures of 1*l.* each. No dividend was ever paid on the shares, but the company applied its profits in redeeming debentures:—

Held, that the share of the partnership profits received by the company was income which became "payable" to the company within the meaning of s. 18 of the Act, and since by means of the transfer of assets whereby it became so payable the appellant's wife acquired rights by virtue of which she had power to enjoy income of the company, that income was to be deemed

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**Present*: VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD PORTER.

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hers for the purposes of the Income Tax Acts, so that the appellant incurred liability in respect of it.

Observations by Viscount Simon L.C. on tax avoidance.

Decision of the Court of Appeal [1942] 1 K. B. 299 affirmed.

Appeal from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows: There existed in Rhodesia a partnership firm called John Mack & Co., which owned and worked an enterprise known as the Golden Valley Mine. Mr. Mack, who lived in Rhodesia, owned a one-third share. Four women, namely, the appellant's wife, her two daughters, and Mrs. Jane Johnson, owned the rest. On March 20, 1933, by an agreement of that date, these four women, being all at that time resident in the United Kingdom, sold as from April 1, 1932, their shares in the partnership to a limited company formed for the purpose and registered on the same date under the laws of Southern Rhodesia. The company was named the Latjohn Trust, Ld., The consideration was 260,000*l.*, satisfied by the issue to the sellers of ten thousand 1*l.* shares, and 250,000 debentures of 1*l.* each. The debentures carried no interest, and there was no provision as to period of redemption. The appellant's wife was entitled to one-sixth of the consideration, namely, 1667 shares and 41,667 debentures. Latjohn Trust, Ld., proceeded to carry on business in partnership with Mr. Mack, and the accounts showed the sums receivable by the company in the various years in respect of its two-third share of the profits of John Mack & Co. Latjohn Trust, Ld., never declared a dividend, but applied its profits in redeeming debentures. It was the practice of the four women to borrow money from the company in anticipation of the redemption of debentures which they held. Until the Finance Act, 1936, came into force, Mrs. Latilla, as the result of these arrangements, was able to obtain for herself a share in the profits which the Latjohn Trust, Ld., derived from the partnership business, without incurring for herself or for her husband, the appellant, any liability to British income tax. The appellant, as the person assessable in respect of his wife's income, contended that the provisions of that Act had not altered the position. The Crown claimed that, under s. 18, sub-s. 1, of that Act, income tax and sur-tax were payable by the appellant in respect of the income of Latjohn Trust, Ld., which Mrs. Latilla had " power to enjoy " and assessments to sur-tax and income tax were, accordingly, made on him. The Special

Commissioners confirmed the assessments, finding that the transfer "was effected mainly for the purpose of avoiding "British taxation and was not a bona fide commercial "transaction." Lawrence J. dismissed an appeal by the appellant, and the Court of Appeal (Lord Greene M.R., Clauson and du Parcq L.JJ.) affirmed his decision. The appellant appealed to the House of Lords.

Tucker K.C. and *Donovan* for the appellant. The only transfer of assets within the provisions of s. 18, sub-s. 1, of the Finance Act, 1936, is a "transfer of assets by virtue or in "consequence whereof, either alone or in conjunction with "associated operations, income becomes payable to persons "resident or domiciled out of the United Kingdom." These words are apt to describe, not the transfer of a business, but rather a transfer of stocks and shares. The profits which accrued to Latjohn Trust, Ld., were earned by the subsequent trading activities of the Latjohn Trust, Ld., or its agents and were not produced by the transfer. Further, the phrase "income becomes payable" is not apt to describe the earning of trading profits. It presupposes that there is a person who pays and a person who receives a sum of money impressed with the character of income. Trading profits are never payable by anybody to anybody. They result merely from an account taken between what has been spent and what has been lost by depreciation set against gross receipts. In the present case the money received from the sale of minerals is only an item in finding out the amount of the profits. The words of the section are not "money becomes payable," but "income becomes payable," and they must be given their ordinary meaning which is distinguished from such words as "income accrues" or "income arises." The company has had income, but this has not been paid to it: see *Trustees of Psalms and Hymns* v. *Whitwell* (1) and *Rex* v. *Special Commissioners of Income Tax. Ex parte Shaftesbury Homes and Arethusa Training Ship* (2). Further, the absence of any rules in s. 18 of the Act providing appropriate machinery for the computation of trading profits, such as those which appear in cases 1 and 2 of sch. D to the Income Tax Act, 1918, and the absence of any provisions for the carry-forward and set-off of losses or for deductions on account of wear and tear of machinery indicate that the legislature did not intend to make

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(1) (1890) 7 T. L. R. 164; 3 Tax Cas. 7. (2) [1923] 1 K. B. 393.

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the profits of a trade wholly carried on abroad, whether alone or in partnership, the subject of tax. The section was carefully drawn and where a wide meaning was intended wide language was used, but in the material part of the section a narrow expression was chosen. [They referred to *Lord Howard de Walden* v. *Inland Revenue Commissioners* (1) and *Colquhoun* v. *Brooks* (2).] Further, one partner cannot be a debtor to another in respect of the partnership business or the money of the partnership, nor can he be a creditor of the partnership or of his co-partner in respect of the sum representing the share of profits of the partnership to which that partner is entitled. Moneys which have come to the partnership already belong to both partners. A partner already owns his share of the partnership profits. He cannot pay himself or his co-partner out of those profits any more than a person can pay himself out of the profits of his own business. Accordingly, no income became " payable " to Latjohn Trust, Ld., since that would presuppose a hand to pay and a hand to receive (i.e., a debtor and a creditor or a trustee and a cestui que trust) and could not cover the case of a person drawing money already belonging to him jointly with his co-partner. The difference in partnership law between England and Scotland, a partnership in Scotland having an existence apart from its members, is not fatal to this contention. Under s. 18 the court is always dealing with a person outside the United Kingdom and so no conflict can arise between English and Scots law. [They referred to *Richardson* v. *Bank of England* (3) and *Rodriguez* v. *Speyer Brothers* (4).]

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills* for the respondents. The assessments made on the appellant rightly included the income of the Rhodesian company which his wife had power to enjoy within the meaning of s. 18 of the Act, since it fell within the class of income to which the section applied. That section is designed to prevent avoidance of tax by a transfer of assets abroad. Accordingly, the words "income becomes payable " have a wide, popular meaning covering any sort of income. There is no distinction here between income " payable " and " arising," since, as appears from their context, the words were meant to take in a wide

(1) [1942] 1 K. B. 389, 395.

(2) (1889) 14 App. Cas. 493, 501, 503.

(3) (1838) 4 My. & Cr. 165.

(4) [1919] A. C. 59, 87, 89.

field and a variety of transactions. Rights have been transferred to the company as a result of which it receives from year to year sums of money. The share of the partnership profits to which it is entitled come to it under the terms of the partnership, and it is entitled to call on the other partner to do whatever is necessary, e.g., by signing a cheque on the partnership banking account, to enable it to obtain that share. That share is in every sense "payable" to the company. Further, it was the transfer of assets which produced the income. The activities of the partners were "associated "operations" within s. 18, sub-s. 1, these words being wide enough to cover the operation of turning to account the assets which are the subject of the transfer. [They referred to *Colquhoun* v. *Brooks* (1).]

Tucker K.C. replied.

The House took time for consideration.

Feb. 11. VISCOUNT SIMON L.C. My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are "entitled" to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manœuvres. ✓Another consequence is that the legislature has made amendments to our income tax code which aim at nullifying the effectiveness of such schemes. The question in the present appeal is whether s. 18 of the Finance Act, 1936, has the result of checkmating the design of avoiding income tax and sur-tax which was the main purpose of certain highly artificial dispositions made in 1933.

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(1) 14 App. Cas. 493.

The appellant contended before the Special Commissioners, before Lawrence J. and before the Court of Appeal that the avoidance of British taxation was not the main purpose of these arrangements. He failed in this contention at each stage. One of the reasons adduced in his printed case to this House is that the scheme adopted in 1933 "was a bona fide "commercial operation not designed for the purpose of such "avoidance." If this were true, the scheme would have come within the exemption provided, as the law then stood, for operations not effected for the main purpose of avoiding liability to taxation, and the appellant would escape tax. Counsel for the appellant prudently decided to drop the contention. The contrary finding adopted by the Special Commissioners and affirmed by both courts below, is, as the Master of the Rolls says (1), "quite unassailable." Nevertheless, if the Crown is unable to bring the scheme of 1933 within the range covered by s. 18 of the Finance Act, 1936, the appellant must succeed. The issue turns on a comparison of the particular arrangements now before us with the language of the section.

It is manifest that the debentures were brought into existence merely that their redemption might serve as a means, from time to time, of transferring part of the profit of the mine to these women in the form of capital. Admittedly, by receiving sums in redemption of her debentures, the appellant's wife has "power to enjoy" income of Latjohn Trust, Ld.: see sub-s. 3 of s. 18 of the Finance Act, 1936. The decisive question is whether the right by virtue of which she has this power to enjoy has been acquired by means of the sort of transfer to which s. 18 applies. The appellant correctly argues that "any such transfer" in sub-s. 1 means any "transfer of assets by virtue or in consequence whereof, "either alone or in conjunction with associated operations, "income becomes payable" to the company. He then contends—and this is the pinch of the case—that trade profits made by a partnership cannot be said to be income a share of which "becomes payable" to one of the partners. One partner, it is said, is not a creditor of the partnership. The share of partnership profits to which Latjohn Trust, Ld., became entitled could not, in this view, be described as income which "became payable" to the company. The answer to this argument is to be found in the powerful judgment of

(1) [1942] 1 K. B. 299, 303.

Lawrence J., and again in a passage from the judgment of the Master of the Rolls which I would respectfully adopt as expressing with the greatest clearness and precision the true view of the application of s. 18 to the facts of this case. Speaking for the Court of Appeal, Lord Greene declared his disagreement with the appellant's arguments, and continued (1): "The share of the profits of the partnership to which the "company is entitled is that share which comes to it in "accordance with the terms of the partnership. The company "is entitled to call upon its partner to do whatever may be "necessary, for example, by signing a cheque on the banking "account of the partnership to enable the company to obtain "its share. In the partnership accounts the company's "undrawn share of profits would appear as a debt owing to "the company. If the profits were under the control of the "other partner, the company could by appropriate proceedings "compel him to pay over its share. If this is not income "' payable ' to the company, we do not know what it is. "With regard to the argument that it was not the transfer "of assets which produced the income but the activities of the "partners, we agree with the argument submitted by the "Attorney-General that those activities are ' associated "' operations ' within the definition of that phrase in sub-s. 2. "By that sub-section, so far as is relevant, an associated "operation means, in relation to any transfer, ' an operation "' of any kind effected by any person in relation to any of the "' assets transferred,' words of the widest import which, "in our judgment, clearly cover the operation of turning the "assets to account."

These words of the Master of the Rolls completely justify the conclusion that the appellant's attempt to avoid British income tax and sur-tax by these artificial arrangements has been frustrated by the Act of 1936. This is not a case requiring an examination of previous authority, but I may add that, in my opinion, the two decisions cited by the appellant on the meaning of " annual payment " in s. 105 of the Income Tax Act, 1842 (*Trustees of Psalms and Hymns* v. *Whitwell* (2), and *Rex* v. *Special Commissioners of Income Tax. Ex parte Shaftesbury Homes and Arethusa Training Ship* (3)) have no bearing here. The recent decision of this House in *Commissioners for General Purposes of Income Tax for City of*

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(1) [1942] 1 K. B. 299, 304.

(2) 7 T. L. R. 164; 3 Tax Cas. 7.

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London v. *Gibbs* (1) goes to show that the technical view of the nature of partnership in English law cannot always be taken in applying the law of income tax. I move that the appeal be dismissed, with costs.

My Lords, I am authorized by my noble and learned friends, LORD ATKIN and LORD RUSSELL OF KILLOWEN, to say that they concur in the opinion which I have delivered.

LORD THANKERTON. My Lords, I concur.

LORD PORTER. My Lords, the conclusion which your Lordships have to reach in this case depends on the construction and effect of s. 18 of the Finance Act of 1936. That section contains a proviso exempting cases where the subject shows to the satisfaction of the Special Commissioners that the transfer dealt with was effected for some purpose other than avoiding liability to taxation. This proviso was amended in 1938 so as to have a stricter application, but whether the earlier or later provisions be applicable the Commissioners have found (and it is now conceded that we are bound by their finding) that in the present instance they are not so satisfied.

The main argument, however, presented to your Lordships was centred on the words "payable to." It was said that those words necessitated the existence of a payer and a payee, and that income could not become "payable" out of partnership funds to a company which was a member of the partnership. A partner, it was contended, was already the owner, among other things, of his share of the partnership profits and could no more pay himself out of those profits than an individual could pay himself out of the profits of his own business.

No doubt, it is true to say that an individual cannot pay himself, if "pay" be used in its strict sense, but no question of an individual's ability to do so arises here. The only question is whether income can be said to be payable to a partner out of the partnership assets. I think it can. "Payable" is not a term of art, and, though a partner cannot sue the partnership or the partners individually for the purpose of recovering partnership assets, yet, as the Master of the Rolls points out, he has at his disposal means whereby he can ensure that his share reaches his hands. In such circumstances it seems to me that the word "payable" is appropriately

(1) [1942] A. C. 402.

used and accurately conveys the process by which the income finds its way into the pocket of the individual. It would, I think, not inaccurately be described as having been paid to him out of the partnership funds.

The appellants, however, sought to support their argument by the suggestion that, though cases 1 and 2 of sch. D have provided appropriate machinery for calculating what the profit of a business is, no such machinery exists in the case of s. 18 of the Act of 1936. They maintained that this omission showed that moneys earned by the personal carrying on of a business abroad, whether alone or in partnership, were not intended to be subject to tax under this section. No doubt, this is a matter for consideration, but it is an element only and not a very important one. I can see no reason why a proper estimate cannot be made where the case requires it.

As the Lord Chancellor has already observed, the principles laid down in *Trustees of Psalms and Hymns* v. *Whitwell* (1) and *Rex* v. *Special Commissioners of Income Tax. Ex parte Shaftesbury Homes and Arethusa Training Ship* (2), are not applicable here. They deal with different wording, and in those instances no partnership existed. Whatever may be the true view in the circumstances which existed in them, they do not touch the case where money is receivable by a partner out of partnership property.

I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Birkbeck, Julius, Edwards & Co.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

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(1) 7 T. L. R. 164; 3 Tax Cas. 7.

(2) [1923] 1 K. B. 393.

[HOUSE OF LORDS.]

H. L. (E.)* TILLEY . . . . APPELLANT;

AND

WALES (INSPECTOR OF TAXES) . . . . RESPONDENT.

1942
Dec. 10, 11, 14;
1943
Feb. 11.

Revenue — Income tax — Assessment — Managing director — Agreement releasing pension rights and accepting reduced salary for the future—Lump sum consideration—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *sch. E.*

Under an agreement entered into in 1937 the appellant was employed by a company as managing director at a salary of 6000*l.* a year with a right on his ceasing to be employed by the company to receive a pension of 4000*l.* a year for ten years. In 1938 a new agreement was entered into under which he released the company from the obligation to pay this pension and agreed to serve as managing director at a reduced salary of 2000*l.* a year. The company, in consideration of this, agreed to pay him the sum of 40,000*l.* by two equal instalments payable on April 6, 1938, and April 6, 1939:—

Held, that so much of the sum of 40,000*l.* as related to commutation of pension was not taxable under sch. E, as being in the nature of a capital payment substituted for a series of recurrent and periodic sums which partook of the nature of income, but that so much as was paid in compromise of the reduction of salary was so taxable, as being within the charge on profits from the office of director.

Decision of the Court of Appeal (sub nom. *Wales* (*Inspector of Taxes*) v. *Tilley*) [1942] 2 K. B. 169, varied.

APPEAL from the Court of Appeal.

The facts, stated by Viscount Simon L.C., were as follows: Three agreements were made at different dates between Stevenson and Howell, Ld., carrying on the business of manufacturing chemists, and the appellant, Vernon James Tilley. The first of these agreements was dated December 19, 1921. It recited that the appellant was "the inventor of "a secret process for the manufacture of a product to be used "by the company in connexion with their manufacturing "business." Under this agreement, the appellant who was already a director of the company, divulged to the then managing director his secret process, and the company contracted to pay to the appellant a royalty of one shilling on every pound weight of the new product manufactured under the secret process and used by the company. The next agreement was dated June 28, 1937. By that time the appellant had become managing director and as such was receiving a salary of 2000*l.* per annum. The agreement cancelled the arrangement of 1921 for the payment of the royalty and in consideration of this provided that the appellant's salary as managing director should be raised to 6000*l.* per annum, and that, in the event of the appellant "ceasing from any cause whatsoever to be managing director "of the company, the company agrees to pay to him as and "from the date of cessation a pension of 4000*l.* per annum "for ten years from the same date." The agreement ended with a paragraph providing that "the expression ' Mr. Tilley ' "includes, where the context so permits, his personal representatives." The agreement dated April 6, 1938, recited the provisions made the year before for the salary and pension and then went on to record that the company had requested the appellant (1.) to release it from the prospective obligation to pay the pension, and (2.) to serve the company in future at a salary of 2000*l.* per annum. The agreement witnessed the appellant's acceptance of these requests, and in consideration of this the company agreed to pay to Mr. Tilley the sum of 40,000*l.* by two equal instalments, the first on April 6, 1938, and the second on April 6, 1939. Assessments having been made on the appellant under sch. E to the Income Tax Act, 1918, in respect of the two amounts of 20,000*l.*, the Special Commissioners discharged the assessments on the ground that the payment of 40,000*l.* was not made to the appellant "as remuneration for services rendered or to be "rendered by him in his office as managing director of "the company." On appeal, by case stated, Lawrence J. reversed this decision, holding (1.) that, in so far as the payment was made in consideration of the appellant's agreement to serve at a reduced salary, it was income taxable under sch. E, and (2.) that, as regarded the part of the sum payable in commutation of the pension, it was also taxable under sch. E on the ground that, as the pension could have been so taxable, a sum paid in commutation of it was also taxable. The Court of Appeal having affirmed this decision, the appellant appealed to the House of Lords.

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* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD PORTER.

Needham K.C. and *Donovan* for the appellant. In such cases as this it is almost impossible to find a general principle. In each case one must look at the particular context. Here the sum of 40,000*l*. was paid, not for services rendered by the applicant in his office as managing director, but partly in consideration of the surrender by him of his right to a pension and partly in consideration of his surrender of the increase of salary granted by the agreement of 1937. It was not a profit of his employment, and the case does not come within sch. E (1). The release made by the appellant was really a sale back to the company. Just as he could have assigned part of his salary to another person, so when, under the agreement of 1938, he released part of his salary he was in effect selling it back to the company. The company was thereby released from a contingent liability, since the duration of the obligation to pay him the increased salary could not be known; and a sum of money paid to obtain a release from a contingent liability under a contract of employment is not remuneration for services rendered under the contract. If a servant is employed at 4*l*. a week and his master wishes to continue to employ him at 2*l*. a week, giving him 100*l*. for renouncing the other 2*l*. a week, that is not a profit from an employment: see *Dewhurst* v. *Hunter* (2). The emphasis in the agreement of 1938 is not on the service, but on the reduction of the salary: *Cameron* v. *Prendergast* (3) is not applicable here. In any event, the sum attributable to the commutation of the pension is not taxable under sch. E, for a pension is only assessed after the office has come to an end: see s. 17 of the Finance Act, 1932, relating to tax in respect of voluntary pensions which begins: "Where a

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(1) By Income Tax Act, 1918, sch. E: "Tax under sch. E shall "be charged in respect of every "public office or employment of "profit, and in respect of every "annuity, pension, or stipend "payable by the Crown or out of "the public revenue of the United "Kingdom . . . ."

By r. 1 of the Rules Applicable to Schedule E, as amended by by s. 45, sub-s. 1, of the Finance Act, 1927: "Tax under this "schedule shall be annually charged "on every person having or "exercising an office or employ-"ment of profit mentioned in this "schedule, or to whom any annuity, "pension, or stipend, as described "in this schedule, is payable, in "respect of all salaries, fees, wages, "perquisites or profits whatsoever "therefrom and shall be computed "on the amount of all such "salaries, fees, wages, perquisites "or profits whatsoever therefrom "for the year preceding the year "of assessment . . . ."

(2) (1932) 146 L. T. 510, 515; 16 Tax Cas. 605, 645.

(3) [1940] A. C. 549.

"person has ceased to hold any office . . . .": *Stedeford* v. *Beloe* (1). The sum received in commutation of the pension is compensation for a source of income. It is really proceeds of the sale of property, and, therefore, capital: *Duff* v. *Barlow* (2), *Dewhurst* v. *Hunter* (3). Assuming that tax is due in respect of the amount attributable to reduction of salary but not that attributable to the commutation, an apportionment would present no difficulty and that matter should be referred back to the Special Commissioners for determination. [They referred to *Inland Revenue Commissioners* v. *Paget* (4); *Foley* v. *Fletcher* (5); *Inland Revenue Commissioners* v. *William Ransom & Sons, Ld.* (6); *Inland Revenue Commissioners* v. *Maxse* (7); and *Harrison* v. *John Cronk & Sons, Ld.* (8).]

Sir Donald Somervell A.-G. and *R. P. Hills* for the respondent. The whole sum of 40,000*l.* was paid to the appellant as managing director and was a profit arising from that office chargeable to income tax under sch. E of the Income Tax Act, 1918, as falling within the words "all salaries, fees, wages, perquisites, "or profits whatsoever" in r. 1. Sums paid by a company to a director while he is holding his office are prima facie either for past, present or future services as a director. It matters not whether the payment takes the form of a large sum in advance to cover a period of years, or a number of sums spread uniformly over the period, or a large sum at the end of the period: *Cameron* v. *Prendergast* (9), *Allen* v. *Trehearne* (10). Prima facie, it cannot make any difference that at any given moment of time the remuneration which a director is receiving is paid under an agreement in substitution for remuneration payable under an earlier agreement. For example, if he was entitled to 5*l.* a week payable weekly and it was agreed that he should receive in substitution for that 200*l.* a year payable in advance, it could not be suggested that this sum was not taxable under sch. E. The sale by an annuitant of his annuity for a lump sum provides no analogy, for there is in that case no question of remuneration. Where a man is and continues in an office what he receives by way of

(1) [1932] A. C. 388.
(2) (1941) 23 Tax Cas. 633, 641.
(3) 146 L. T. 510; 16 Tax Cas. 605.
(4) [1938] 2 K. B. 25, 44, 45.
(5) (1858) 3 H. & N. 769, 779.
(6) [1918] 2 K. B. 709.
(7) [1919] 1 K. B. 647.
(8) [1937] A. C. 185.
(9) [1940] A. C. 549, 559, 563.
(10) [1938] 2 K. B. 464.

commutation is still payment for his services, and as such is taxable under sch. E. The conception of a capital sum cannot enter into the matter. If a sum is received as a personal gift and not as personal income from an employment, it is not chargeable to tax: *Seymour* v. *Reed* (1), the case of the cricketer's benefit, but a limited company cannot make gifts. As regards the pension which was commuted, that was in this case merely deferred remuneration. Accordingly, the sum received in respect of commutation is also remuneration and taxable under sch. E. The effect of the commutation was to bring back the deferred remuneration within the period of the tenure of the office. It matters not whether it be by lump sum or otherwise. Accordingly, the release of the company from the obligation to pay the pension did not affect the result that the sum of 40,000*l.* when paid to the appellant was a profit arising from his office. *Dewhurst* v. *Hunter* (2) does not apply to this case. The 40,000*l.* was an entire, and not a severable, consideration, but, if the House takes the view that tax is due under one head and not under the other, the Crown is content that it should be treated as apportionable. [They referred to *Weight* v. *Salmon* (3), *Cowan* v. *Seymour* (4), and *Mudd* v. *Collins* (5).]

Needham K.C. replied.

The House took time for consideration.

Feb. 11. VISCOUNT SIMON L.C. My Lords, the question in this case is whether two sums of 20,000*l.* each which were paid to the appellant by a company named Stevenson & Howell, Ld., carrying on the business of manufacturing chemists, of which he was managing director, fall to be assessed for income tax under sch. E. as being profits from his employment as such director. The circumstances in which this question arises are very special.

As long as matters stood on the basis of the agreement of 1937 there can be no doubt that the appellant's salary of 6000*l.* per annum was subject to income tax under sch. E and that, when his service as managing director ceased, the

(1) [1927] A. C. 554, 559.

(2) 146 L. T. 510; 16 Tax Cas. 605.

(3) (1935) 153 L. T. 55; 19 Tax Cas. 174.

(4) [1920] 1 K. B. 500.

(5) (1925) 133 L. T. 186; 9 Tax Cas. 297.

pension of 4000*l*. per annum was equally liable to tax under the second limb of that schedule. The agreement of 1937 ended with a paragraph providing that "the expression "'Mr. Tilley' includes, where the context so permits, his "personal representatives." As the Court of Appeal has pointed out, this makes the construction of the agreement, so far as it provides for "pension," somewhat difficult, and, in view of the nature of the conclusion at which I would invite the House to arrive, it is desirable to indicate whether under the agreement the pension would in any case cease with the appellant's death or whether it would be payable, in the event of his death, to his personal representatives until the period of ten years had elapsed. I think the second of these constructions is the correct one. It is evident that the 40,000*l*. on which the Crown seeks to levy income tax is paid in part as the price of compounding the pension, and in part in consideration of the reduction of the appellant's annual salary from 6000*l*. to 2000*l*. I will postpone the consideration of any difficulty which might arise from the fact that the total of 40,000*l*. is stated as a single sum and is not divided by the terms of the agreement into two parts allocated respectively to the compounding of the pension and the reduction of salary, and will first consider how far sch. E would be applicable if the two matters were dealt with separately, X*l*. being stated in the agreement as representing the value of the pension rights, and Y*l*. as being paid in return for the reduction of salary, so that the two sums added together, X*l*. plus Y*l*., amounted to the total of 40,000*l*.

If it is legitimate to separate out the consideration in this way, it appears to me that there are two decisions of your Lordships' House which guide us to the conclusion at which we must arrive, one in connexion with the pension problem and the other in connexion with the payment in respect of the reduction of salary. As regards the commutation of pension, I cannot agree with Lawrence J.'s view that, as the pension would have been assessable under sch. E, therefore a sum payable in commutation of it would also be assessable under the same schedule. I think that the Master of the Rolls is right when he says that the decision in *Short Bros., Ld.* v. *Inland Revenue Commissioners* (1), to which Lawrence J. referred in this connexion, does not support the

(1) (1927) 136 L. T. 689; 12 Tax Cas. 955.

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learned judge's proposition, and neither can I accept the contention contained in the case for the respondent (but not, as I understood, persisted in by the Attorney-General) that the pension under the agreement of 1937 was deferred remuneration and that the acceptance by the appellant during his service of a sum in commutation of the pension amounted to the acceptance of a present remuneration instead. Neither the pension nor the sum paid to commute it constituted, in my opinion, profit from the office. If pension was paid after ceasing to hold the office, it would have been assessable under the head of "pension" in sch. E and r. 1 of the rules applicable to that schedule. I agree with the unanimous view of the members of the Court of Appeal that a pension is in itself a taxable subject-matter distinct from the profit of an office, and, if an individual agrees to exchange his right to a pension for a lump sum, that sum is not taxable under sch. E. This conclusion is in accordance with the views of the majority of the Law Lords when this House decided *Dewhurst* v. *Hunter* (1). There an article of association of the company which had employed Commander Dewhurst provided that when a director died or resigned or ceased to hold his office for a cause not reflecting upon his conduct or competence, the company should pay to him or his representatives "by "way of compensation for the loss of office" a sum equal to the total amount of his remuneration in the preceding five years. Commander Dewhurst subsequently agreed with the company, at a time when he was ceasing to be chairman but was remaining a director, that in lieu of his rights under this article he should be paid 10,000*l.*, while his remuneration as director was at the same time reduced to 250*l.* per annum. Lord Warrington, Lord Atkin and Lord Thankerton held that the 10,000*l.* was not a profit from his employment as director and did not represent salary, but was a sum of money paid down by the company to obtain a release from a contingent liability as distinguished from being remuneration under the contract of employment. Lord Thankerton emphasized the further point that the payment was not in the nature of income at all. It is true that the decision in *Dewhurst's* case (1) was regarded and described as arising in very special circumstances, but I think the ratio decidendi is as I have described. Moreover, apart from previous authority, I should myself take the view that a lump sum paid to

(1) (1932) 146 L. T. 510; 16 Tax Cas. 605.

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commute a pension is in the nature of a capital payment which is substituted for a series of recurrent and periodic sums which partake of the nature of income.

But can the same view be taken of an arrangement made between an employer and his servant under which, instead of the whole or part of a periodic salary, a single amount is paid and received in respect of the employment? Generally speaking, I think not. An "office or employment of profit"—to use the actual phrase in sch. E—necessarily involves service over a period of time during which the office is held or the employment continues. The ordinary way of remunerating the holder or the person employed is to make payments to him periodically, but I cannot think that such payments can escape the quality of income which is necessary to attract income tax because an arrangement is made to reduce for the future the annual payments while paying a lump sum down to represent the difference. My view seems to me to be supported by the decision of this House in *Cameron* v. *Prendergast* (1). In that case the respondent was a director of a company and was minded to resign his position and so obtain greater ease. His fellow directors, in the interests of the company's success, urged him not to do so, and an agreement was made between the company and himself under which his salary was reduced from 1500*l.* to 400*l.* per annum, but he also received 45,000*l.* This House decided that the 45,000*l.* was a profit from the respondent's directorship and was therefore assessable under sch. E. I am not myself prepared to go so far as to say, as was said by the Master of the Rolls and Goddard L.J. in the present case, that remuneration for service can never be capital in the sense which would put it outside income tax. It is worth pointing out that the word "remuneration" does not occur in sch. E at all and it is safer to use the words of the statute. I prefer to limit myself to the case now under consideration, and to say that, whatever part of the 40,000*l.* should be regarded as the equivalent of a drop in salary amounting to 4000*l.* a year, is within the charge on profits from the office of director.

There remains the question, which might otherwise have raised some difficulty, whether, when capitalization of pension is not taxable and a sum paid in compromise of a reduction in salary is taxable, the 40,000*l.* which is agreed between the parties to be the value of the two things together can be split

(1) [1940] A. C. 549.

up. We are relieved in the present case from deciding the point, for the Attorney-General agreed that the two sums of 20,000*l*. each should be treated as apportionable if the House took the view that tax was due under one head but not under the other. Accordingly, I move that these two assessments should be referred back to the Commissioners that they may determine, according to the best of their judgment, what would be a reasonable apportionment. So much of the two sums as should be taken as paid in substitution for the reduction of salary should be assessed, in the appropriate years, for tax under sch. E. The balance of the two sums which should be regarded as representing the purchase price of the annuity should escape taxation. I move accordingly. The appellant should have his costs of the appeal to this House, and there should be no costs in the Court of Appeal on either side.

My Lords, I am authorized by my noble and learned friends LORD ATKIN and LORD RUSSELL OF KILLOWEN to say that they concur in the opinion which I have just delivered.

LORD THANKERTON. My Lords, the Crown claims that the sum of 40,000*l*. paid to the appellant in two instalments at a year's interval under the agreement of April 6, 1938, is chargeable to income tax under sch. E of the Income Tax Act, 1918, as paid to him in respect of his office of director and coming within the words of r. 1 of sch. E, namely, "all salaries, fees, "wages, perquisites or profits whatsoever therefrom." My noble and learned friend on the woolsack has made sufficient reference to the various agreements, and I agree that, to appreciate the two-fold consideration in return for which the 40,000*l*. was agreed to be paid, it is necessary to refer to the agreement of June 28, 1937, the terms of which equally necessitate a reference to the earlier agreement of December 19, 1921. The Crown failed before the Special Commissioners on the ground that the payment of 40,000*l*. was not made to the present appellant "as remuneration for services rendered "or to be rendered by him in his office as a managing director "of the company." On appeal, by stated case, Lawrence J. decided in favour of the Crown, holding that both in form and substance the payment was made in consideration both of the release from the company's obligation to pay the pension and the present appellant's agreement to serve at a reduced salary of 2000*l*. per annum. As regards the latter element, the learned judge held that it was clearly a profit from the

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office, and, as regards the ten-year pension, he held that, as the pension would have been assessable under sch. E by virtue of s. 17 of the Finance Act, 1932, the sum payable in commutation thereof was assessable under sch. E, and he based this finding on the decision in *Short Brothers, Ld.* v. *Inland Revenue Commissioners* (1). An appeal by the present appellant to the Court of Appeal was dismissed, but partly on grounds materially different from those of Lawrence J. All the learned judges differed from his statement as to the assessability of a sum paid in commutation of a pension and the Master of the Rolls pointed out (2) that *Short Brothers, Ld.* v. *Inland Revenue Commissioners* (1) did not support the view of the learned judge. Further, all the learned judges of the Court of Appeal were of opinion that, if the agreement of 1938 had expressly apportioned the consideration of 40,000*l.* between cl. 1 and cl. 2, the portion referable to cl. 1, which released the pension obligation, would not have been chargeable to tax, but that the portion referable to cl. 2, which contained the agreement to serve as managing director at a reduced salary, was chargeable to tax, as it fell directly within the decision of this House in *Cameron* v. *Prendergast* (3), but the learned judges—MacKinnon L.J. dubitante—held that, as the parties themselves had refrained from apportionment, an apportionment by the court was not permissible. Goddard L.J. appears to have further held that, in view of the conditions attached to the payment of the pension, it would be impracticable to make such an apportionment.

My Lords, in common with all the learned judges below, I have no doubt that, in so far as the payment of the 40,000*l.* may be referable to the agreement to serve as managing director at a reduced salary, there is liability to tax, the decision in *Cameron* v. *Prendergast* (3) being directly in point. It satisfies, in my opinion, the two tests, namely, (i.) whether it arose from the office of director within the meaning of r. 1, and (ii.) whether it is in the nature of income. I may add that I doubt whether the word "capital" is the exact antonym to the latter test. While I would agree that, according to common experience, any consideration given in return for services in the office of director is likely to be in the nature of income, I am not prepared to state dogmatically that it must in every conceivable case be so, whatever form it takes, as the

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(1) 136 L. T. 689; 12 Tax Cas. 955.

(2) [1942] 2 K. B. 169, 173.

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learned Master of the Rolls and Goddard L.J. appear to think. It is enough that there is no difficulty in the present case. In so far as the payment of the 40,000*l.* may be referable to the agreement to accept a sum in commutation of the liability to pay a pension, I have nothing to add to the view expressed by my noble and learned friend on the woolsack. As in *Dewhurst's* case (1) this payment did not arise from the office of director, but in spite of it. I also agree with the view expressed by my noble and learned friend on the question of apportionment. I would desire to note, on the question of practicability, referred to by Goddard L.J., that the present appellant's accountants appear to have provided the basis for the agreed sum of 40,000*l.* I concur in the motion proposed by my noble and learned friend.

LORD PORTER. My Lords, as MacKinnon L.J. has pointed out (2) your Lordships are not without assistance when considering the problem which this matter presents. In *Dewhurst* v. *Hunter* (1) and *Cameron* v. *Prendergast* (3) this House has at least discussed the question, and, in my view, has decided it.

By the so-called "1938" agreement the appellant received two sums of 20,000*l.* each and in return gave two separate considerations: (i.) He released the company from an obligation to pay a pension of 4000*l.* a year for ten years from his ceasing to be managing director; and (ii.) he agreed to serve the company at a reduced salary of 2000*l.* instead of as theretofore at 6000*l.* granted him by the agreement of 1937. It was claimed for the Crown that both these two sums of 20,000*l.* were taxable as a profit from the directorship, but that, even if the former was not so taxable, the commutating sums paid for each were so inextricably interwoven that it was not possible to ascertain how much was paid for the one and how much for the other, and that, consequently, the subject must pay on the whole. This was, as I understand it, the view of the majority of the Court of Appeal. MacKinnon L.J., however, though he would himself have taken the view that each item would be severally taxable, held himself bound by the principles evolved in the two cases referred to above, and, therefore, considered that any sum paid in commutation of the pension was not taxable, whereas the sum paid as a

(1) 146 L. T. 510; 16 Tax Cas. 605.

(2) [1942] 2 K. B. 169, 178.

(3) [1940] A. C. 549.

consideration for the agreement to serve on as managing director at a reduced salary was taxable. My Lords, I agree that this result follows if the remuneration can be apportioned between salary and pension. As I see it your Lordships have so decided in the cases referred to above and are bound by authority so to hold.

The Attorney-General argued that this present case differed from *Dewhurst* v. *Hunter* (1) in that the sum paid in commutation of the pension rights was paid while the appellant was still serving as a director and that the sum paid in commutation of a pension to a person so serving differed from that paid in respect of a pension already due to a director whose service had come to an end. I do not feel able to accede to this argument. In my view, a sum received on the sale or surrender of pension rights is not taxable under sch. E because it is neither pension nor annuity and comes under no other heading of that section. It is in the headnotes to *Dewhurst's* case (1) said to be exempt as being capital and not income. It is not, as I think, a pension or annuity, and, therefore, not income taxable under sch. E, but I doubt if much assistance is to be obtained by making use of the antinomy between capital and income. The Attorney-General sought to distinguish *Dewhurst* v. *Hunter* (1) on the ground that in that case the pension was not deferred pay whereas in this case it was, and admitted that if it were not the Crown would have no claim to tax. Such a contention makes it necessary to determine the grounds on which the pension was granted in the agreement of 1937. No special consideration is stated in that document. The granting of the pension apparently forms one of the general terms of the agreement under which the appellant promises to give up his right to receive one shilling in respect of each pound of material manufactured under his secret process. Moreover, the pension is payable at any moment at which he may cease to be employed as managing director whatever the cause, and it is apparently payable to his personal representatives. I cannot think that such a provision represents deferred pay. It looks much more like a payment in lieu of the stipulated reward for revealing the secret process, but it is unnecessary to speculate. It is a sum paid for the release of an obligation to provide a pension and it is not shown to be given instead of deferred pay. If so, it is admittedly not subject to tax.

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(1) 146 L. T. 510; 61 Tax Cas. 605.

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Just as, in my opinion, it follows, from the reasoning in *Dewhurst's* case (1) that any part of the two sums of 20,000*l.* which was paid in respect of the surrender of the pension rights is not subject to tax under sch. E, so, in consequence of the decision in *Cameron* v. *Prendergast* (2), the remaining part of that sum which was given in lieu of the surrendered payment of 4000*l.* as managing director is, I think, taxable as a profit from a public office. It only remains, therefore, to see whether the sum attributable to the release of the pension can be separated from that payable for the reduction of salary. It was only faintly argued on behalf of the Crown that such a division was not possible, but it was said that there were no materials on which such a calculation could be made inasmuch as the cessation of the salary and the commencement of the pension were dependent on many unascertainable matters, among others on the appellant's choice of the time of his retirement. No doubt, there are difficulties, but the resultant figure seems no more incalculable than, say, the length of time during which an injured workman would have continued to earn wages had he not received his injury, a period difficult no doubt to ascertain, but one which has constantly to be estimated in dealing with cases of personal injury. My Lords, I agree that this appeal should be allowed in part and in part dismissed, and concur in the order suggested by the Lord Chancellor.

Appeal partly allowed.

Solicitor for appellant: *R. G. Percival.*
Solicitor for respondent: *Solicitor of Inland Revenue.*

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(1) 146 L. T. 510; 16 Tax Cas. 605.

(2) [1940] A. C. 549.

[HOUSE OF LORDS.]

PERRIN AND OTHERS . . . . APPELLANTS;

AND

MORGAN AND OTHERS . . . . RESPONDENTS.

H. L. (E.)*
1942
Nov. 3, 4, 5;
1943
Jan. 25.

Will—Construction—Gift—"All moneys of which I die possessed"—Meaning of "money."

Appeal—House of Lords—Benefit of successful appeal enuring to persons not appellants.

A testatrix, by her will drawn without legal assistance, directed that "all moneys of which I die possessed of shall be shared by "my nephews and nieces now living." Her estate consisted of investments valued at 32,783*l.*; cash at bankers amounting to 689*l.*; dividends received or accrued, 36*l.*; rents due prior to her death, 82*l.*; income tax repayment due to her, 32*l.*; household goods valued at 62*l.*; freeholds specifically bequeathed valued at 1445*l.*; and freeholds not mentioned in the will valued at 340*l.*:—

Held, that the bequest included all the net personalty.

In interpreting a will the court is not bound in the absence of special circumstances to adopt a fixed meaning of the word "money" as being its "legal" as opposed to its "popular" meaning, but must ascertain as between various usual meanings which is the correct interpretation of the particular document in the light of the context and other relevant circumstances.

Per Lord Russell of Killowen. The meaning of the word "money" in a will is not restricted by any hard and fast rule but depends on the context in which it occurs, properly construed in the light of all relevant facts, and, given such a sufficient context, it may include more than what is called "money in the strict "sense."

Per Lord Romer. The rules of construction should be regarded as a dictionary by which all parties, including the court, are bound, but the court should not have recourse to it to construe a word or a phrase until it has ascertained from the language of the whole will read in the light of the circumstances whether or not the testator has indicated his intention of using the word or phrase otherwise than in its dictionary meaning.

Observations on the effect of a successful appeal enuring to the benefit of persons who were not appellants.

Decision of Court of Appeal (sub nom. *In re Morgan. Morgan* v. *Morgan*) [1942] Ch. 345 reversed.

APPEAL from the Court of Appeal.

The facts, stated by VISCOUNT SIMON L.C. and LORD ROMER, were as follows: The will of the testatrix was typed on a form supplied by law stationers, and was not made with professional aid or skill. Its terms were as follows: "This is the last will "and testament of me Emily Rose Morgan of New Farm "King's Somborne in the county of Southampton spinster. "I give devise and bequeath to my nephew Leonard Morgan "the six cottages called 'Vicarage Terrace' King's Somborne "and to my nephew Charles Burnett Morgan the eight cottages "in Nutcher's Drove King's Somborne and also the two "thatched cottages with pasture called 'Knowlton.' I "direct that all moneys of which I die possessed of [sic] shall "be shared by my nephews and nieces now living, namely: "Leonard Morgan, Charles Burnett Morgan, Laura B. Avery, "Charles Robert Morgan, Christina J. A. Jeggo, Enid E. "Perrin, Percy E. Morgan, Olive L. E. Morgan, Robert G. "Morgan, Ida W. Allan, Ciscilia Morgan, Leslie Gilbert "Morgan, Lilian E. Morgan, Ellen Treble. I give to my "sister Julia Palmer if alive at my decease the legacy or sum "of five hundred pounds. I appoint my nephew Charles "Burnett Morgan as executor of this my will. And I revoke "all former wills. In witness whereof I have hereunto "subscribed my name this 27th day of September One thousand "nine hundred and thirty-five. EMILY ROSE MORGAN." The testatrix died on October 14, 1939. At the date of her will she had two sisters living, Julia Palmer and Henrietta Reeves, and fifteen nephews and nieces. Only one sister, Henrietta Reeves, besides thirteen nephews and nieces, survived her. The testatrix's estate consisted of personalty in the shape of investments (stocks or funds of the United Kingdom and of the Dominions, securities of municipal corporations and stocks and shares and debentures of companies) valued at a total of 32,783*l.* 5*s.* 3*d.*; cash at bankers amounting to 689*l.* 12*s.* 3*d.*; dividends received or accrued, 36*l.*; rents due prior to her death, 82*l.* 17*s.* 9*d.*; income tax repayment which was due to her, 32*l.* 4*s.*; and household goods, etc., valued at 62*l.* The total of her personal property was, therefore, 33,685*l.* 19*s.* 3*d.* In addition, the testatrix died possessed of real estate, namely, freeholds at King's Somborne valued at 1445*l.*, and a freehold at Michelmersh worth 340*l.* The freeholds at King's Somborne were the subject of specific devises, but the freehold at Michelmersh was not mentioned in the will. Farwell J. decided, on an originating summons—(*a*) that the shares given to a nephew and niece who predeceased the testatrix passed as on an intestacy, and "(*b*) that the bequest of all moneys of which "the testatrix died possessed included dividends and interest "received or accrued due to the date of her death, cash at her "bankers, rents due to the date of her death, the proportion "of the rents to the date of her death in respect of property "devised to her for life . . . . and any sums recovered by "way of repayment of income tax, and did not include any "other items of her estate." The appellants, eight nephews and nieces, having appealed, the Court of Appeal affirmed this decision. The appellants appealed to the House of Lords.

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* *Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD RUSSELL OF KILLOWEN, and LORD ROMER.

Beebee for the appellants. The phrase "all moneys of "which I die possessed" included the whole personal estate of the testatrix. If a will is drawn by a lawyer, it is proper to adopt the so-called strict legal meaning of the word "money," according to the rule deriving from *Shelmer's Case* (1), which includes only cash or currency in a testator's possession or due to him (e.g., choses in action, such as sums on current or deposit account at a bank, but not investments): see *Lowe* v. *Thomas* (2); *In re Taylor. Taylor* v. *Tweedie* (3); and Hawkins on Wills, 3rd ed., pp. 61, 62; but, in the case of the will of a layman who was inops consilii, "money" must be given its popular meaning which includes all personal estate: *Forth* v. *Chapman* (4). To find the sense in which the word is used in a particular will it is necessary to look at the circumstances and the context, but, if there must be a fixed rule of construction, it should be that "money" in a will drawn by a layman should have its widest signification, save in so far as the context requires it to be construed in some more restricted sense. As a universal test the so-called rule as to the meaning of "money" "in the strict sense" is quite inappropriate. A layman who has not consulted the legal dictionaries cannot have heard of it, for it is not to be found in any non-legal dictionary: see, e.g., Oxford English Dictionary. Under the rule the courts have attached an esoteric meaning to the word "money," which imposes an arbitrary technical meaning on the language of lay persons making their own wills and almost invariably operates to defeat their manifest intentions, thereby creating an intestacy. Its effect may be to deprive the judge of the right to use his common sense as in *Byrom* v.

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(1) (1725) Gilb. 200.
(2) (1854) Kay, 369.
(3) [1923] 1 Ch. 99.
(4) (1720) 1 P. Wms. 663, 666.

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Brandreth (1); *In re Gates. Gates* v. *Cabell* (2); and *In re Hodgson. Nowell* v. *Flannery* (3). The rule runs counter to the modern tendency to ascertain the intentions of a testator from the language of the will read in the light of all admissible circumstances without undue regard to previous decisions on more or less similar language in other wills made at other times and in other circumstances. It is also contrary to the recognized leaning of courts of construction against a construction which involves an intestacy. The appellants rely on *Prichard* v. *Prichard* (4); *In re Cadogan. Cadogan* v. *Palagi* (5); and *In re Jennings. Caldbeck* v. *Stafford* (6). In the present case everything goes to indicate that " money " includes all the personal estate of the testatrix. There is no residuary gift. The effect of holding otherwise would be to create an intestacy to the extent of 32,000*l.* out of 33,000*l.*, and it would be unreasonable to attribute to the testatrix this deliberate intention.

Danckwerts for the executor and the other legatees. The rule requiring a gift of money in a will primarily to be construed strictly as including only cash, currency and sums on account at a bank is not binding on this House. There is no presumption as to the meaning of " money," which must be deduced from its context and the circumstances. If there be a presumption, it should be that the expression covers prima facie the whole estate, including, if necessary, land: see *Chapman* v. *Reynolds* (7). On the context of this will and in the circumstances " money " covers the residuary personal estate, but as the testatrix has attempted to deal with her real estate separately that is not included.

Hewins for the next of kin. The established rule is that in a will the word " money " or " moneys " must be construed as meaning cash, i.e., currency in the testator's possession, sums to his credit at a bank on current or deposit account, and any other sums of which he was entitled at the time of his death to demand immediate payment. That is the proper construction in the absence of any context or admissible circumstances indicating that the word has been used in a more extended sense. A very slight context is sufficient to extend the meaning, and the context may justify the inclusion of the whole of the personal estate, but in the absence of any context "money" should be construed in the strict legal sense: *Shelmer's Case* (1); *Hotham* v. *Sutton* (2); *Gosden* v. *Dotterill* (3); *Lowe* v. *Thomas* (4); *Glendening* v. *Glendening* (5); *Ogle* v. *Knipe* (6); *Collins* v. *Collins* (7); *Byrom* v. *Brandreth* (8); *Manning* v. *Purcell* (9); *In re Taylor* (10); *In re Gates* (11); *In re Putner. Putner* v. *Brooke* (12); *In re Collings. Jones* v. *Collings* (13); and Hawkins on Wills, 3rd ed., p. 67. Other decisions do not invalidate the rule. *Lynn* v. *Kerridge* (14) stands by itself outside the line of the authorities. *In re Cadogan* (15) can be supported within the scope of the rule. *In re Jennings* (16) is not really a departure from the rule, but it expresses it in different terms. There has been no change in modern circumstances to justify its reversal. In the Court of Appeal Lord Greene M.R. (17) suggested that the number of small investors was greater now than when the rule was formulated, but there were always members of the public whose testamentary dispositions might be defeated by the rule, and, accordingly, there is no real change of circumstances. Moreover, few testators bequeath "my money" without any context at all. As for the humbler class of testators, they rarely leave their property by general description, but usually dispose of it specifically. The rule has drawn the line so as to exclude stocks and shares from the term "money." Everyone realizes that there is an actual distinction between money on credit at a bank and investments, and this is founded on reality. Money at the bank can be put in a man's pocket simply by writing a cheque, whereas he must find a buyer for stocks and shares. Further, in the case of money at the bank he will get a precise amount of pounds, shillings and pence, while in the case of investments (save as regards debentures) the proceeds of a sale will vary from time to time. If the strict legal meaning of "money" is to be changed it is hard to see where one should stop. If prima facie it is to be taken

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(1) (1873) L. R. 16 Eq. 475.
(2) [1929] 2 Ch. 420.
(3) [1936] Ch. 203.
(4) (1870) L. R. 11 Eq. 232.
(5) (1883) 25 Ch. D. 154.
(6) [1930] I. R. 196.
(7) (1860) 28 Beav. 221.

(1) Gilb. 200.
(2) (1808) 15 Ves. 319.
(3) (1832) 1 My. & K. 56.
(4) Kay, 369.
(5) (1846) 9 Beav. 324.
(6) (1869) L. R. 8 Eq. 434.
(7) (1871) L. R. 12 Eq. 455.
(8) (1873) L. R. 16 Eq. 275.
(9) (1855) 7 De G. M. & G. 55.
(10) [1923] 1 Ch. 99, 108.
(11) [1929] 2 Ch. 420.
(12) (1929) 45 T. L. R. 325.
(13) [1933] Ch. 920.
(14) (1737) West temp. Hard. 172.
(15) 25 Ch. D. 154.
(16) [1930] I. R. 196.
(17) [1942] Ch. 345, 347.

to include the whole personal estate, that, in the absence of context or circumstances, is merely to speculate. It should be borne in mind that while such ambiguities only occur in the case of a will not drawn by a professional person, the fact that it is a home-made will is one of the circumstances to be taken into consideration in construing it. In the will in the present case there is no sufficient context to extend the meaning of "moneys" beyond its strict primary meaning. Although the document was "home made" it was not composed by the testatrix without the opportunity of consulting some precedent, as witness the attestation clause and the words "I give devise and bequeath." It was not made in articulo mortis, but four years before the death of the testatrix. At that time she may have had no investments. There is no evidence as to that. She may have intended to dispose of her investments subsequently by codicil or she may have intended the bulk of her property to pass in accordance with the Administration of Estates Act, 1925. It is clear that she did not intend to dispose of all her property, for she left some of her freeholds undisposed of and also her furniture, which could not, in any event, be regarded as "moneys." Further, had she meant "money" to cover her investments the result would have been that there was not sufficient to meet the legacy to her sister which was beyond the value of the undisposed of realty. Finally, the expression "all moneys of which I "die possessed" suggests, not something comparatively static like investments, but something which might fluctuate between the date of her will and her death, like a bank balance.

Beebee in reply. As there is no strict residuary clause in this will it is probable that the gift in general form was intended as a residuary gift. The absence of any context is a reason for giving a wide meaning to the word "moneys" which, in the case of a layman's will, should cover all property unless there is a context to cut down this construction. The existing rule, though of long standing, does not depend on the construction of any statute or on the common law, and if it is overruled now no title or contract will be shaken and no general course of dealing altered, whereas much practical injustice to testators, particularly of the humbler class, will be prevented: see *Bourne* v. *Keane* (1).

The House took time for consideration.

(1) [1919] A. C. 815, 874.

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Jan. 25. VISCOUNT SIMON L.C. My Lords, this appeal raises the interesting and important question whether, when the word "money" appears in an English will as the description of that of which the testator is disposing, the word, in the absence of any context or other circumstances proper to be considered as varying its meaning, must be interpreted according to an alleged fixed "rule of construction" which has been regarded by our courts as established and binding for many generations past, and which is said to be traced back to a pronouncement of Gilbert C.B. in 1725: *Shelmer's Case* (1).

The will in the present case was typed on a form supplied by law stationers, and the phrasing of it, as the Master of the Rolls pointed out, goes clearly to show that it was not made with professional aid or skill. Indeed, this is admitted. On the view of Farwell J., the nephews and nieces named in the will do not share in any of the investments, and out of personal property of the aggregate value of 33,685*l.* 19*s.* 3*d.*, what under the will falls to be shared between them is about 840*l.* The testatrix would thus be taken to have died intestate as to the whole of the rest of her personal estate. The Court of Appeal, with manifest reluctance, felt constrained to confirm this view. Indeed, that court could take no other course than follow and apply the rule of construction by which, owing to previous decisions of courts of co-ordinate jurisdiction, it was bound. Lord Greene M.R. defined the rule thus (2): "The rule is, and it has been laid down on many "occasions, that the word 'money' in a will must be "construed in what is called its strict sense, unless there is "a context which permits of an extended meaning being "given to it. The strict sense of 'money,' curiously enough, "—and this is one of the anomalies about this rule—is a "sense which has been invented by the courts, and invented, "I think, partly in order to get rid of the rigours of the rule "which would have existed if the word 'money' had been "confined to actual cash—which, no doubt, was the original "meaning. That was felt by the courts to be going too "far, so they have invented a special category which they "have called 'money in the strict sense,' which includes "money not in any strict sense, because it includes choses "in action, such as moneys on drawing account at a bank. "But that category is closed, and we cannot extend the "language unless there is a context permitting such a course.

(1) Gilb. 200.

(2) [1942] Ch. 345, 346.

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"In the present case I am afraid that I cannot find such a "context." Lord Greene M.R., in his judgment (1), called attention to the remarkable fact that, in applying this rule in previous cases, judges have many times observed that they believed themselves to be defeating the intention of the testator. Lord Greene M.R. allowed himself to use the strong expression (1) that the rule "is a blot upon our jurisprudence," but he pointed out that, as far as the authorities go, it was open to the House of Lords to reconsider the whole matter. The majority of your Lordships are, as I understand, prepared not only to interpret the language of the present will, but to pronounce on the much larger matter of the rule itself, and I proceed to deal with this general question.

My Lords, the fundamental rule in construing the language of a will is to put on the words used the meaning which, having regard to the terms of the will, the testator intended. The question is not, of course, what the testator meant to do when he made his will, but what the written words he uses mean in the particular case—what are the "expressed "intentions" of the testator. In the case of an ordinary English word like "money," which is not always employed in the same sense, I can see no possible justification for fixing on it, as the result of a series of judicial decisions about a series of different wills, a cast-iron meaning which must not be departed from unless special circumstances exist, with the result that this special meaning must be presumed to be the meaning of every testator in every case unless the contrary is shown. I agree, of course, that, if a word has only one natural meaning, it is right to attribute that meaning to the word when used in a will unless the context or other circumstances which may be properly considered show that an unusual meaning is intended, but the word "money" has not got one natural or usual meaning. It has several meanings, each of which in appropriate circumstances may be regarded as natural. In its original sense, which is also its narrowest sense, the word means "coin." Moneta was an appellation of Juno, and the Temple of Moneta at Rome was the mint. Phrases like "false money" or "clipped money" show the original use in English, but the conception very quickly broadens into the equivalent of "cash" of any sort. The question: "Have you any money in your purse?" refers presumably to bank notes or Treasury notes, as well as to shillings and pence. A further extension would include not only coin and currency in the possession of an individual, but debts owing to him, and cheques which he could pay into his banking account, or postal orders, or the like. Again, going further, it is a matter of common speech to refer to one's "money at the bank," although in a stricter sense the bank is not holding one's own money and what one possesses is a chose in action which represents the right to require the bank to pay out sums held at the call of its customer. Sums on deposit, whether with a bank or otherwise, may be included by a further extension, but this is by no means the limit to the senses in which the word "money" is frequently and quite naturally used in English speech. The statement: "I have my money invested on mortgage, or in debentures, or "in stocks and shares, or in savings certificates," is not an illegitimate use of the word "money" on which the courts are bound to frown, though it is a great extension from its original meaning to interpret it as covering securities, and, in considering the various meanings of the word "money" in common speech, one must go even further, as any dictionary will show. The word may be used to cover the whole of an individual's personal property—sometimes, indeed, all of a person's property, whether real or personal. "What has "he done with his money?" may well be an inquiry as to the general contents of a rich man's will. Horace's satire at the expense of the fortune-hunter who attached himself to childless Roman matrons, has its modern equivalent in the saying: "It's her money he's after." When St. Paul wrote to Timothy that the love of money is the root of all evil, he was not warning him of the risks attaching to one particular kind of wealth, but was pointing to the dangers of avarice in general. When Tennyson's Northern Farmer counselled his son not to marry for money, but to go where money is, he was not excluding the attractiveness of private property in land. These wider meanings of "money" are referred to in some of the reported cases as "popular" meanings, in contrast to the "legal" meaning of the term, but for the purpose of construing a will, and especially a home-made will, a popular meaning may be the more important of the two. The circumstance that a skilled draftsman would avoid the use of so ambiguous a word only confirms the view that, when it is used in a will, the popular as opposed to the technical use of the word "money" may be important. I protest against the idea that, in

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(1) [1942] Ch. 345, 346.

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interpreting the language of a will, there can be some fixed meaning of the word "money," which the courts must adopt as being the "legal" meaning as opposed to the "popular" meaning. The proper meaning is the correct meaning in the case of the particular will, and there is no necessary opposition between that meaning and the popular meaning. The duty of the court, in the case of an ordinary English word which has several quite usual meanings which differ from one another is not to assume that one out of several meanings holds the field as the correct meaning until it is ousted by some other meaning regarded as "non-legal," but to ascertain without prejudice as between various usual meanings which is the correct interpretation of the particular document.

I now turn to some of the reported cases, premising only that it seems to me a little unfortunate that so many of such cases should find their way into the books, for in most instances, the duty of a judge who is called on to interpret a will containing ordinary English words is not to regard previous decisions as constituting a sort of legal dictionary to be consulted and remorselessly applied whatever the testator may have intended, but to construe the particular document so as to arrive at the testator's real meaning according to its actual language and circumstances. It can rarely happen, I should suppose, that the interpretation of a word like "money" in one will provides a sure and certain guide to its meaning in another will, which is differently expressed. In *Abbott* v. *Middleton* (1), a decision of this House in which Lord Chelmsford L.C., Lord Cranworth, Lord St. Leonards, and Lord Wensleydale all took occasion to expound the governing rule as to the interpretation of wills, Lord Wensleydale observed: "A great many cases were cited "at the bar, as they always are, when the question is on the "construction of wills. Generally speaking, these citations "are of little use. We are no doubt bound by decided cases, "but when the decision is not upon some rule or principle of "law, but upon the meaning of words in instruments which "differ so much from each other by the context, and the "peculiar circumstance of each case, it seldom happens that "the words of one instrument are a safe guide in the construction of another."

The decision reported as "*The Case of Mary Shelmer's* "*Will*" (2), is (like some other entries in the volume) not a judicial decision, but arose out of a case submitted to

(1) (1858) 7 H. L. C. 68, 119. (2) Gilb. 200.

Gilbert C.B., and is an award signed by him. It is to be noted that the reporter (who, as the preface to the volume indicates, was none other than the Chief Baron himself) inserts a query in the margin (1) as to whether the award "is final "or good in law." Gilbert C.B. was asked in 1725 to decide as between relatives and servants of the testatrix as to the proper interpretation of the gift to two servants of "all my "household goods, money and plate, that I shall leave behind "me at the time of my death undisposed of, and not bequeathed "to others." The learned arbitrator observed (2) that the word "money" in our language "is a genus that comprehends "two species, namely, ready money and money due, that is "to say, the money in her own hands, or her money in the "hands of any body else; and therefore in this case the "bequests to her servants will comprehend Mr. Wood's "mortgage, and the arrears of rent, since these must be looked "upon by all the rules of construction to be Mrs. Shelmer's "money at the time of her death; but the word money will "not comprehend South-Sea stock or annuity stock, because "that is an interest arising out of funds, settled by publick "laws; and though it be redeemable by money, or saleable "for money, yet it can be no more looked upon as money at "the time of Mrs. Shelmer's decease than a term of years, a "coach and horses, or any other real or personal chattel "whatsoever can." There is no specific reference in the report to "Mr. Wood's mortgage," and I am inclined to think, in view of an earlier passage, that the reference must be to interest due to the testatrix on the mortgage when she died. It appears to me that Gilbert C.B., in making this award, did not regard himself as laying down a definition for use in subsequent cases, but was addressing himself solely to the meaning of the rather complicated document which was then before him.

Be that as it may, there is no doubt that in course of time the rule to which Lord Greene M.R. refers took shape and was increasingly regarded in the Court of Chancery as a mandatory rule of construction. Even where a decision as to the meaning of the word "money" was really arrived at by examining the terms of a particular will, there has been a tendency to quote the decision as establishing the proper interpretation for future cases, and that, notwithstanding that the interpretation adopted was felt not to give to the word "money" the meaning intended by the testator. Thus, in *Hotham* v. *Sutton* (1), Lord Eldon L.C., sitting in the Court of Chancery, began his judgment by saying (2): "It is very probable that this "testatrix, if she was here, might decide both the questions, "that have been made, differently from what must, I think, be "the decision of them," and one of the decisions was that "money" in the codicil then being considered did not include "stock." In *Gosden* v. *Dotterill* (3) a testator, after giving some pecuniary legacies, directed that "the rest of my money "be equally divided, share and share alike, between A and B." Leach M.R. said (4) that he had "no doubt that it was the "intention of this testator that the stock" [it was some 600*l.* in consols] "should pass under the term 'money,'" but, after delaying his decision in order to examine the authorities, he decided (5) "that the term 'money' will not pass stock unless "there is in the will some explanatory context, and here is no "explanatory context." In *Lowe* v. *Thomas* (6), Page Wood V.-C., after referring to *Hotham* v. *Sutton* (1) and *Gosden* v. *Dotterill* (3) as being decisions that he was bound to follow, held that a bequest of "the whole of my money" to X for his life, and at his death to be divided between Y and Z, could only avail to pass some 60*l.* of cash, and did not cover a considerable sum of stock in the funds. The Vice-Chancellor, at the end of his judgment, observes: "It is painful to be "obliged to come to the conclusion to which I have come upon "the construction of this will; because I should have had "strongly the impression, that, in ordinary parlance, the "word 'money' as here used, might have included the stock "in question, if I were not compelled by authority to hold "otherwise." The Vice-Chancellor's decision was upheld on appeal (7).

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(1) Gilb. 200, 203.

(2) Ibid. 202.

There were other decisions in which, having regard to the language and framework of the will, a wider interpretation was adopted. For example, in *Prichard* v. *Prichard* (8) Malins V.-C. began his judgment by saying: "The object must "be to ascertain the intention of the testator. The word "'money' will, in many instances, mean that money which "a testator has in his house, or at his bankers at call; and "if a man gives his ready money, or money as distinguished

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(1) 15 Ves. 319.
(2) Ibid. 326.
(3) 1 My. & K. 56.
(4) Ibid. 59.
(5) Ibid. 60.
(6) Kay, 369, 378.
(7) (1854) 5 De G. M. & G. 315.
(8) L. R. 11 Eq. 232, 234.

"from other property, the court will see what was intended to "pass, as in *Manning* v. *Purcell* (1). So in this case, if the "testator, after the gifts of money, had added a residuary "clause, I should have said, What portion of his property "did he mean when he used the term 'money'? but he "makes one universal gift, without distinction, and he must "either have intended to die intestate or he intended by the "word 'money' to describe all his property." The Vice-Chancellor held that, on the language of that will, the wider interpretation was correct. Similarly, in *In re Cadogan. Cadogan* v. *Palagi* (2) Kay J. said: "I feel compelled to hold "that the lady used the word 'money' in this will in the "popular sense as a description of all her personal estate, "and I do not think that any of the cases have laid down a "rule which prevents that construction." The extent, however, to which the earlier authorities were regarded as establishing the presumption of a more restricted meaning may be well illustrated from the language of Lord Selborne L.C., when sitting for the Master of the Rolls in *Byrom* v. *Brandreth* (3). Lord Selborne's language is as follows: "I "wish very much that I could accede to the argument of "Mr. Rigby, because I cannot resist the impression that "probably that which this testatrix intended is what he "suggests. If the authorities had not required that the "word 'money' should be strictly construed, I am by no "means certain that it would not be more in accordance "with the ordinary and popular use of the word to hold it, "when used in this way in a testamentary instrument, to "be significant of all that we call personal or movable "property, which, as a general rule, unless there be particular "directions to the contrary, is subject to conversion after "death. But though this is one of the instances in which "the necessity of adhering to strict principles of construction "renders it doubtful whether those principles may not more "frequently contradict than give effect to the intention, yet, "looking to the principle by which I am bound, I am compelled to hold that the word 'money' cannot be extended "to such an interest as the legacy in question." The testamentary gift which Lord Selborne was engaged in construing was a gift of "any money of which I may die "possessed." The Court of Appeal in *In re Taylor. Taylor* v.

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(1) (1854) 2 Sm. & G. 284; 7 De G. M. & G. 55.

(2) 25 Ch. D. 154, 157.

(3) L. R. 16 Eq. 475, 478.

Tweedie (1) found a context in the will before it which justified it in treating a bequest of " the money I have and am entitled "to now and at any future time" as including invested capital. The judgments in that case, however, show that the lords justices felt bound by earlier authority to draw a contrast between the "popular" and the " legal " sense of the word " money." Younger L.J., for example, observes (2): " This "popular interpretation cannot, however, in the absence of a "context, be placed upon the word ' money ' when used in a "will, although the court will, to aid that interpretation, so "far at least as personal estate is concerned, fasten upon even "a slight context when it can find one." In the absence of context to tip the balance, the modern decisions all come down on the side against the " popular " sense: see, for striking examples, *In re Gates. Gates* v. *Cabell* (3), and *In re Hodgson. Nowell* v. *Flannery* (4).

Notwithstanding this long tradition I would urge the House to reject the view that, in construing a will, the court must start with a presumption in favour of a particular narrower meaning of the word " money " (though not, indeed, its narrowest meaning), and that, in the absence of contradictory context, the court is bound to apply this narrower meaning, even though the inference is that this is not what the testator really meant by the term. As I have already said, the word "money " has more than one meaning, and it is, in my opinion, a mistake to pick out one interpretation of the word and to call it the " legal " meaning or the " strict legal " meaning as though it had some superior right to prevail over another equally usual and not illegitimate meaning. The context in which the word is used is, of course, a main guide to its interpretation, but it is one thing to say that the word must be treated as having one particular meaning unless the context overrules that interpretation in favour of another and another thing to say that " money," since it is a word of several possible meanings, must be construed in a will in accordance with what appears to be its meaning in that document without any presumption that it bears one meaning rather than another. While disclaiming any idea of interpreting a document which is not before me, I should have thought that the mere fact that a will in a single sentence disposed of " all the money "of which I die possessed " was a reason for interpreting

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(1) [1923] 1 Ch. 99.
(2) Ibid. 110.
(3) [1929] 2 Ch. 420.
(4) [1936] Ch. 203.

"money" in a very wide sense, though there is no positive context.

In choosing between "popular" meanings, it seems to me that an interpretation which includes realty as well as personalty in the word "money" may often be going too far, though, of course, everything turns on the language and circumstances of the particular will. An amateur will-maker, though using the word "money" loosely, may be drawing a distinction between "my money" and "my land," and, indeed, may mean to include leaseholds as well as freeholds in the latter expression, if he owns both. In the present case, the testatrix owned no leaseholds, so the question whether "all moneys" would have included leaseholds does not arise. On the other hand, the will deals separately with the more important of the freeholds, and this circumstance goes to show that "all moneys" in this will does not include the omitted freeholds. If the expression were "all remaining "moneys" it might have been different.

I have felt it right to deal with this case in the wider aspect, but before parting from it I must add that I am much disposed to share the view which I understand commends itself to some of your Lordships, that even if the so-called rule of construction were to be left standing, there are some indications in this will which might justify the application of the so-called rule being displaced by the language used and the circumstances of the case. The testatrix directed that "all moneys "of which I die possessed" should be "shared by my nephews "and nieces" as named. The testatrix held very considerable investments to which she makes no separate reference in her will. If the state of her property when she made her will was anything like what it was at her death, she must, therefore, either have deliberately intended to die intestate in respect of her stocks and shares and to leave these nephews and nieces to share in what happened to be the balance at her bank at the moment of her death and little else, or else she must have used the phrase "all moneys of which I die possessed" as covering her investments also. But whether or not these considerations would be sufficient to overthrow the presumption which has for so long been regarded as prima facie forcing the court to apply a narrower meaning, it is clear that, when the rule is rejected and the present will is given its natural construction free from the restraining use of a judicial dictionary, the appeal should succeed.

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The present question is not, in my opinion, one in which this House is required, on the ground of public interest, to maintain a rule which has been constantly applied but which it is convinced is erroneous. It is far more important to promote the correct construction of future wills in this respect than to preserve consistency in misinterpretation. The view expounded by Lord Birkenhead L.C. in *Bourne* v. *Keane* (1) applies here. As Meredith J., in his pungent and entertaining judgment in *In re Jennings. Caldbeck* v. *Stafford* (2) observes, the judiciary has waged a long fight to teach testators that "money" means "cash," but as the ordinary testator who makes his own will does not study the law reports, he persists in constantly using the word in a wider sense, and it is time that in such cases a "popular" meaning prevailed over the "legal" one. I, therefore, move that the appeal be allowed, and that it should be declared that the bequest of "all moneys "of which I die possessed" includes all the net personalty of the estate of the testatrix.

LORD ATKIN (read by Lord Thankerton). My Lords, I have had the opportunity of considering the opinion of the Lord Chancellor with which I wholeheartedly agree, and find it unnecessary, therefore, to repeat his reasoning. The substance of the matter seems to be that the word "money" at the present time has a diversity of meanings, and that when it is found in a will there is no presumption that it bears one meaning rather than another. The testator obviously meant to dispose of, at any rate, some part of his property by the phrase, and the construing court has to ascertain what was meant, being guided by the other provisions of the will and the other relevant circumstances, including the age and education of the testator, his relations to the beneficiary chosen, whether of kinship or friendship, the provision for other beneficiaries, and other admissible circumstances. Weighing all these, the court must adopt what appears the most probable meaning. To decide on proven probabilities is not to guess but to adjudicate. If this is to decide according to the "context," I am content, but I cannot agree that the court is precluded from looking outside the terms of the will. No will can be analysed in vacuo. There are material surroundings such as I have suggested in every case, and they have to be taken into account. The sole object is, of course,

(1) [1919] A. C. 815, 860. (2) [1930] I. R. 196.

to ascertain from the will the testator's intentions. The result of your Lordships' decision will be to relieve judges in the future from the thraldom, often I think self-imposed, of judgments in other cases believed to constrain them to give a meaning to wills which they know to be contrary to the testator's intention. In the competition for bad pre-eminence in departure from the true meaning I think I should place first the decision of Turner and Knight Bruce L.JJ. in *Lowe* v. *Thomas* (1), where the testator being possessed of stocks and some cash had left his "money" to his brother for life and on his death to the brother's two daughters with ultimate remainder to the survivor. The testator left 50*l*. cash, and it was held that, despite the series of life interests, the bequest only passed the cash. The poorest mind would know that this was absurd, and so, plainly, did the lords justices, but they were held in thrall. A high place, however, in the competition could be given to *In re Hodgson* (2), where a nurse, asked to make her will within two days of her death and having in her case by the side of her bed some 800*l*. in cash and 600*l*. in savings certificates, left all her "money" to a named beneficiary. She left no next-of-kin and the Crown claimed and was awarded the savings certificates as bona vacantia. In the future the resources of the Crown will receive no such flagitious increment. I anticipate with satisfaction that henceforth the group of ghosts of dissatisfied testators who, according to a late Chancery judge, wait on the other bank of the Styx to receive the judicial personages who have misconstrued their wills, may be considerably diminished. It will be a relief to the whole legal profession that at last what the Master of the Rolls rightly called a blot on our jurisprudence has been removed. On this particular will I have no doubt that for the reasons given by the Lord Chancellor and others of your Lordships the word "money" in the bequest comprised the whole of the testatrix's personal estate.

LORD THANKERTON. My Lords, this appeal arises out of the application by both courts below of a rule of construction of wills, by which they felt bound to construe the words "all "moneys of which I die possessed," which occur in the will, as including only dividends received or accrued, cash at the bank, rents due, the proportion of rents payable to the testatrix as life tenant, and income tax repayment, there being, in the opinion of these courts, no context sufficient to justify a wider meaning. I have had the privilege of considering the written opinions of all your Lordships, and the facts of the case have been fully stated by the noble and learned Lord on the woolsack, who has also reviewed the main decisions which are material.

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(1) 5 De G. M. & G. 315.

(2) [1936] Ch. 203.

Thus two questions arise in the appeal. The first relates to the rule of construction, and is whether the rule, as applied by the courts in the decisions referred to, is a wrong rule altogether, or is a sound rule which has been wrongly applied. This appears to be the first time that this House has had occasion to consider this rule, and I agree with the view, in which I gather all your Lordships concur, that the rule has, at least, been much misapplied. The second question is whether, assuming the rule to be sound, there is a sufficient context in the present case to justify a wider construction of the words "all moneys of which I die possessed." On the second question, I am of opinion that there is here a sufficient context to justify the construction of these words as intended to include the whole of the residuary personal estate, and I agree with the statement of the relevant circumstances by my noble and learned friend Lord Romer, while noting also the absence of an express residuary gift and the appointment of an executor, but it still remains right to express an opinion on the first question.

In England, as in Scotland, the cardinal rule of construction of wills is that they should be so construed as to give effect to the intention of the testator, and I make no excuse for citing a passage from the opinion of Lord Justice Clerk Moncrieff in *Easson* v. *Thomson's Trustees* (1), which raised a similar question: "I am of opinion that these expressions 'money' "or 'moneys' as here used are capable of including and "are terms apt to include the testator's whole movable estate. "Their meaning is of course to be collected from the context, "the place where, and the subject in regard to which, they "are used; and the question is neither what the testator meant, "apart from the words, nor what the words might mean, apart "from intention, but what the testator meant by using them.'" My Lords, it is clear that there has been a tendency on the part of the courts to allow this cardinal rule of construction to give way to the application of what is called the strict legal sense of the word "money." Marked illustrations of this

(1) (1879) 7 R. 251, 253.

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tendency are to be found in the opinions of Leach M.R. in *Gosden* v. *Dotterill* (1); of Page Wood V.-C. in *Lowe* v. *Thomas* (2); and of Lord Selborne in *Byrom* v. *Brandreth* (3). The material passages have been quoted by my noble and learned friend, the Lord Chancellor, and, in my opinion, they justify, in that view, the description of such application of the rule by the learned Master of the Rolls in the present case as "a blot upon our jurisprudence."

There remains the question whether the rule, if purged of such tendencies, can survive, and, on this point I observe some difference of opinion among your Lordships. I will, accordingly, express the opinion that I hold on this point, though I doubt whether, apart from one not unimportant element, there is any real difference between your Lordships. There can be no doubt that the word "money" is capable of being aptly used by a testator in one of various senses in conformity with the ordinary use of the English language, and that the paramount duty of the court is to decide on the sense in which the particular testator used the word in the particular will without any prior presumption as to the particular sense intended by the testator. In my opinion, the cases should be rare in which the court is not able, in discharge of its paramount duty, to determine the sense in which the testator meant to use the word. These cases can only be cases where there is final ambiguity as to which of two or more senses was intended by the testator, and it may well be that the court, in order not to defeat the will, is entitled to hold, as a general rule, that one of these senses is more likely to have been intended by the testator than the other or others. I cannot, however, agree that any such rule can become stereotyped in perpetuity, for such a conception would ignore the fact that the testator's use of the word must be referable to the ordinary uses of the English language at the time when he is making his will, and the ascription to the testator of an intention to use the word in a sense which was determined to be the leading sense in an earlier age, without any regard to the possibility of a variation in this respect which had become current in the English language by the time that the will was made, is not justifiable. The rule here founded on appears to be based on the arbitration award of Gilbert C.B. in 1725—over two hundred years ago—and to have become established before the decision of Lord Eldon L.C. in *Hotham* v. *Sutton* (1)—over a hundred and thirty years ago. The mere fact that the original strict meaning of the word "money," as relating to coin, was held to be subject to relaxation because of the current use of the word at that time, is sufficient, in my opinion, to permit a further relaxation if, in the passage of later years, there has occurred a variation in the sense in which the word is more ordinarily used in the English language. If the court is satisfied that such a variation has occurred, then, in my opinion, it is its duty to give effect to it in the case of a testator who makes his will at a time subsequent to the establishment of such a variation. The court is entitled to be credited with a knowledge of the ordinary use of the English language, and has a duty to apply such knowledge. Exempli gratia, I should think that war savings certificates, as suggested by the Master of the Rolls (2), might well be considered as covered by the ordinary use in the English language, since the last war, of the word "money," and, if that view be correct, I am of opinion that the court would be contravening its paramount duty if it rejected the current use of the word in these days in order to apply the sense which was current in 1725 or in 1808. There does not appear to me to be any occasion for a separate rule in the matter. It is rather to treat the testator, in the case of ambiguity, as having used the word in the sense which the court adjudges to be the more ordinary use of the word in the English language at the time at which the testator used it. I concur in the motion proposed.

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(1) 1 My. & K. 56, 59.

(2) Kay, 369, 378.

(3) L. R. 16 Eq. 475, 478.

LORD RUSSELL OF KILLOWEN (read by Lord Romer). My Lords, I have had the opportunity of reading the opinion prepared by my noble and learned friend Lord Romer in which he points out why, on the language of this particular will, construed in the light of the relevant circumstances, the words "all moneys of which I die possessed of" should be construed as including the whole of the residuary personal estate of the testatrix. I agree with him both in his reasoning and in his conclusion. This result is arrived at in this case on the context of the document. Context has always prevailed against the now much abused rule, as to which I desire to make some observations. The rule, which is attributed to Gilbert C.B., was in its inception a kindly rule. It was not

(1) 15 Ves. 319.

(2) [1942] Ch. 345, 347, 348.

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a restrictive rule, although, strangely enough, it has given rise to the expression "the strict meaning of money." It was a rule born at a time when a man's money meant cash in his possession, and the rule extended the meaning of the bare word so as to include money not in his possession but presently due to him, or, as the Chief Baron (in referring to a testatrix) said, it included ready money and money due, i.e., both her money in her own hands and her money in the hands of anybody else. From time to time the meaning has been widened so as to include other assets, but I have always understood the rule as one which yielded to a sufficient context. With this understanding I do not see why the rule, properly applied, should fail to work justice. The blot, if any, is not the rule, but its misapplication.

There has been, however, a tendency for courts to allow the rule to prevail over context, and to operate as a hard and fast limitation of the meaning of the word "money" when used in a will, and I agree with your Lordships that it is advisable to take this opportunity of establishing that the meaning of the word "money," when used by a testator (whether inops consilii or himself a skilled conveyancer) is not restricted by any hard and fast rule, but depends on the context in which it occurs, properly construed in the light of all relevant facts. In other words, given such a sufficient context, the word "money" may include more than what has been called the strict meaning, and may even include the whole residuary personal estate. Instances of this are the decisions of Malins V.-C. in *Prichard* v. *Prichard* (1) and Kay J. in *In re Cadogan* (2). Beyond this I am not prepared to go. I am not prepared to abolish the rule. So long as it yields to context, it is, as I have said, a kindly rule, and, being a rule of long standing which has for many years decided the title to property other than cash in hand, it should not be disturbed. To abolish it would be a retrogressive step. Let me give an instance. If a testator leaves his money to A and the rest of his property to B, how is the will to be construed? If the rule is abolished, the context admits of only one answer. A will only get the cash in the house. If the rule survives, he will, in addition, get moneys in the bank, and any other assets of the testator to which the rule applies.

Two further remarks I desire to make. Let it be clear, that nothing in this case affects indirectly any other of the many rules for the construction of wills. Those of us who in the past have discharged this almost daily task know full well how important it is that certainty in these matters should exist, and how successfully confusion and uncertainty have been avoided by the applications of these rules which are the product of the learning and wisdom of our predecessors. I wish also to state that I agree with Lord Romer in his remarks as to those judgments in which learned judges have stated their belief that their construction of a will defeats the testator's intention. Either they have misconstrued the will, or they have been indulging in guess-work.

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(1) L. R. 11 Eq. 232.

(2) 25 Ch. D. 154.

LORD ROMER. My Lords, I take it to be a cardinal rule of construction that a will should be so construed as to give effect to the intention of the testator, such intention being gathered from the language of the will read in the light of the circumstances in which the will was made. To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said—that he was, in fact, one of those persons of whom Knight Bruce L.J. said that they spoke as if the office of language were to conceal their thoughts. In many of the cases to be found in the books the court is reported to have said that the construction it has put on a will has probably defeated the testator's intention. If this means, as it ought to mean, that the court entertains the strong suspicion to which I have just referred, no sort of objection can be taken to it, but if it means that the court has felt itself prevented by some rule of construction from giving effect to what the language of the will, read in the light of the circumstances in which it was made, convinces it was the real intention of the testator, it has misconstrued the will.

My Lords, I do not, of course, intend to suggest that well-settled rules of construction are to be disregarded. On the contrary, I think that they should be strictly observed, but they ought to be applied in a reasonable way. It is, no doubt, of great importance to lawyers and others engaged in the preparation of wills that they should have the certainty of knowing that certain well-known words and phrases will receive from the court the meaning that the court has for generations past attributed to them. Much confusion and uncertainty would be caused if this were not so. The rules of construction, in other words, should be regarded as a dictionary by which all parties, including the courts, are bound, but the court should not have recourse to this dictionary to construe a word or a phrase until it has ascertained from an examination of the language of the whole will, when read in the light of the circumstances, whether or not the testator has indicated his intention of using the word or the phrase in other than its dictionary meaning—whether or not, in other words, to use another familiar expression, the testator has been his own dictionary. I have thought it desirable to make these remarks, however elementary and obvious they may seem to be, as I have noticed in some of the reported cases on wills a tendency on the part of the court to pay more attention to the rules of construction than to the language of the testator. This is especially the case where the word "money" is concerned. The rule relating to this word is a strange one. Its prima facie meaning is what would normally be described in the balance sheet of a trading concern as "cash in hand," but the courts have given it a wider meaning when used in wills, and, as the rule now stands and has stood for many years, the word includes in addition certain choses in action by means of which cash is readily procurable. It includes, for instance, balances due to the testator on current or deposit account at his bank. A testator does not, of course, possess any of the cash that is at the bank, but people commonly speak of the balances due to them from the bank as their money at the bank, and the rule can be justified on this ground. But people just as commonly speak of their money in the funds or their money in this or that company or concern, and why all stocks and shares such as usually form the bulk of a testator's personal property should not also be included is what I have never been able to understand. I can see no intelligible reason for excluding them when the rule was opened so as to admit a testator's balance on deposit account, but such seems to be the law, and when a testator is found to be using the word "money" to distinguish one item of his property from the remainder the word prima facie bears the meaning attributed to it by the rule. A testator, nevertheless, may by his will when properly construed show an intention not to use the word "money" as defined by the rule, but to include in it his Stock Exchange investments or even the whole of his residuary personal estate. The question to be decided on this appeal is whether such an intention is to be found in the will of Miss Emily Rose Morgan who died on October 14, 1939. Your Lordships are by now familiar with the precise words of that will, which is dated September 27, 1935. I need not, therefore, repeat them, but I venture to say that no one who reads those words and will for the moment dismiss from his mind the rule as to the construction of the word "money" will entertain the slightest doubt that by the words "all moneys of which I die possessed" the testatrix intended to include the whole of her residuary personal estate. And this will be due to no mere guess work. It will be solely due to the effect produced on the mind of the reader by the language used by the testatrix construed in the light of the circumstances in which her will was made. The relevant circumstances were these. The testatrix at the date of her will had two sisters living. All her brothers and her other sisters were dead, but there were living fifteen nephews and nieces. In these circumstances she left a pecuniary legacy of 500*l.* to one sister, who predeceased her. The only other beneficiaries mentioned in her will were fourteen of the nephews and nieces, for whom she made provision in these words: "I "direct that all moneys of which I die possessed of shall be "shared by my nephews and nieces now living namely." She then named the fourteen nephews and nieces. I am inclined to surmise from the words "my nephews and nieces "now living" that the one nephew omitted from the list was so omitted through an oversight, but, however this may be, I find it impossible to regard the direction as merely applying to moneys as defined by the rule. The use of the word "moneys" in the plural and the use of the word "all" emphatically point, in my opinion, to an intention to dispose of something more than money as so defined and to make the bequest as comprehensive a one as possible. I cannot for a moment believe that, had the testatrix intended to provide what was in substance the whole of the generation of her family next to her own with nothing but money as defined by the rule, she would have used the language that I have quoted. The words, in my opinion, according to their true construction mean the whole of her residuary personal estate. Except in the case of a death-bed will a testator is to be taken as disposing of his property as it may be constituted at some date which he hopes may be far distant. In the present case, indeed, the testatrix in terms describes the subject of her bequest in favour of the nephews and nieces as moneys of which she will be possessed at her death. It must, therefore, be taken to have been in her contemplation that at that date she might possess very little or even no money within the meaning of the rule. It is surely almost ridiculous to suppose that she has by her will directed that there shall be divided between no less than fourteen nephews and nieces merely what cash there might be in the house at the date of her death together with such balance as happened to be then standing to her credit at the bank and the few paltry sums that might have accrued at that date from rents, interest and dividends. This further may be observed. If the testatrix intended, as, in my opinion, she did, to give to her nephews and nieces the whole of her residuary personal estate, what would in fact be divided between them by the executor would, owing to their large number, consist in all probability of cash. This may possibly be the explanation of why the testatrix when directing that her residuary personal estate should be shared by the nephews and nieces described it by the word "moneys," but, whatever may have been the reason actuating the testatrix, I am satisfied that in this particular will the word was, in fact, used as meaning the whole of her residuary personal estate. My Lords, in my opinion, this appeal should be allowed, and I agree with the motion before the House.

Appeal allowed.

Danckwerts. Your lordships will remember that I appeared for four of the respondents, one of whom was the executor and the other three of whom were respondents who wished to take advantage of the appeal but who were not represented in the Court of Appeal and were not in a position to make an appeal to your lordships' House without leave. My request is that they should be given the indulgence of being put into the position of appellants, or, at any rate, of being put into the position of being able to take advantage of your Lordships' decision.

VISCOUNT SIMON L.C. Although sometimes it may create difficulty for counsel, they are, strictly speaking, expected to intervene before the question is voted on. I think you are right to raise the point, because it might well be thought that, if a party did not appeal from the order of Farwell J. and another party did, it would be only the party who appealed who might gain from his success.

Danckwerts. The point was so dealt with in *Elliot* v. *Joicey* (1). In that case there was one person whose interest it was to benefit by an order made by the House of Lords and he neither appealed nor appeared and he was excluded by the terms of the order. I am only desirous of preventing that effect applying in this case. It is not the same because in *Elliot* v. *Joicey* (1) the person in question did not take any part in the proceedings before the House.

VISCOUNT SIMON L.C. We shall not indicate any view which is unnecessarily wide, but a particular construction has now been put on the words of this will, and I should have thought that, at any rate in this case, that might be regarded as enuring to the benefit of all the named nephews and nieces.

LORD THANKERTON. There cannot be two orders of Farwell J. There can be only one and the only order now is Farwell J.'s order as varied by this House.

Solicitors for appellants: *C. R. Enever & Co.*
Solicitors for respondents: *Park Nelson & Co., for G. B. Footner & Sons, Romsey, Hants, and Stocken, May, Sykes & Dearman, for Godwin & Co., Winchester.*

(1) [1935] A. C. 209.

[PRIVY COUNCIL]

J. C.*
1943
Apr. 15.

COMMISSIONER FOR STAMP DUTIES OF NEW SOUTH WALES . . . . } APPELLANT;

AND

PERPETUAL TRUSTEE COMPANY, LIMITED . . . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Revenue—Death duty—Settlement—Trust—Gift of equitable interest in shares—Bona fide possession and enjoyment assumed by donee immediately upon the gift—Retention to entire exclusion of donor—Shares not part of settlor's dutiable estate—New South Wales Stamp Duties Act, No. 47 *of* 1920, *s.* 102, *sub-s.* 2 (*d*).

By an indenture of settlement made in 1917 between the settlor and five trustees, of whom the settlor himself was one, it was declared that the trustees should hold certain company shares of which the settlor was the owner and registered holder, and which were transferred into and registered in the names of the trustees, in trust, briefly, to apply during the minority of his son the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son, and on his attaining the age of twenty-one years to transfer to him as his absolute property all the assets and property whatsoever, including accumulations of income. From the date of the settlement the settlor never exercised any voting power in respect of the shares. With the exeception of premiums paid in respect of a policy of insurance on the life of the son taken out by the trustees, no part of the dividends and income was paid or applied towards the infant's maintenance, advancement or benefit, any balance which might have been so applied being accumulated and invested. The son attained the age of twenty-one years in 1931, when the assets comprised in the settlement were transferred to him. On a claim by the revenue authorities that on the death in 1921 of the settlor the shares the subject of the settlement had formed part of the settlor's dutiable estate by virtue of s. 102, sub-s. 2 (*d*), of the New South Wales Stamp Duties Act, 1920, which provides that " For the purpose of the assessment and payment of death duty " . . . . the estate of a deceased person shall be deemed to include " and consist of . . . . (2.) (*d*) any property comprised in any gift " made by the deceased at any time, whether before or after the " passing of this Act, of which bona fide possession and enjoyment " has not been assumed by the donee immediately upon the gift " and thenceforth retained to the entire exclusion of the deceased,

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**Present:* VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD ROMER, and LORD PORTER.

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" or of any benefit to him of whatsoever kind or in any way " whatsoever " :—

Held, that the settlement, being a disposition of property effected by the creation of a trust without full consideration in money or money's worth was a " gift " within the meaning of s. 100 of the Stamp Duties Act; that the interest of the son under the settlement in the shares and accumulations of income was not an absolute vested interest, but was contingent on his attaining the age of twenty-one years; that the property comprised in the gift was the equitable interest in the shares, and that bona fide possession and enjoyment of the property comprised in the gift was assumed by the donee, the son, immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever, and accordingly the shares did not form part of the settlor's dutiable estate.

In re Cochrane [1905] 2 I. R. 626; [1906] 2 I. R. 200 approved, and held to cover this case, to be distinguishable from *Grey* (*Earl*) v. *Attorney-General* [1900] A. C. 124, and not inconsistent with *Attorney-General* v. *Worrall* [1895] 1 Q. B. 99.

Judgment of the High Court of Australia (1941) 64 C. L. R. 492, affirmed.

APPEAL (No. 47 of 1942), by special leave, from a judgment and order of the High Court of Australia (May 1, 1941) which reversed a judgment and order of the Supreme Court of New South Wales (September 27, 1940).

The following facts are taken from the judgment of the Judicial Committee: The question for decision on this appeal was whether certain shares in a company called R. Hall and Son, Ld., formed part of the dutiable estate of one John Richard Hall, deceased. The proceedings were initiated in the Supreme Court of New South Wales on a case stated by the Commissioner for Stamp Duties for that State under s. 124 of the New South Wales Stamp Duties Act, 1920. The company carried on a business (originally owned by John Richard Hall) of commission and general merchants, and was managed and controlled by him. By an indenture, dated December 7, 1917, he made a settlement of 850 of the shares which he owned in the company, and of which he was the registered holder. Those shares (which were fully paid and of the nominal value of 1*l*. each) were transferred into and registered in the names of five trustees, of whom he himself was one. The name of John Richard Hall (who will hereinafter be referred to as the settlor) stood first in the register of members. By the indenture, which was expressed to be made between the settlor of the one part and the five trustees of the other part, the settlor, in consideration of the natural love and affection which he bore for his infant son, John Stuart Hall, declared that the trustees should hold the said shares upon trusts of which the material provisions ran thus: "1. To pay and apply the whole or such "part or parts as the said trustees shall think fit of the income "and dividends received from the said shares and the investments hereinafter referred to from time to time towards the "maintenance advancement benefit and education of the said "John Stuart Hall during his minority. 2. To invest any "surplus income from time to time in any one or more of the "investments hereinafter authorised with full power to vary the "same from time to time for another or others of a like nature "but so that such accumulation shall always be liable to be "applied for the purposes aforesaid as if the same were income "arising in the then current year. 3. During the minority of "the said John Stuart Hall to apply the said income and/or "any accumulations thereof as aforesaid and/or any proceeds "of sale of the said shares or any part or parts thereof as the "said trustees shall think fit and/or any sum or sums which the "trustees may think fit to raise by way of mortgage on the said "shares or any part or parts thereof for the maintenance "education advancement or benefit of the said John Stuart "Hall and for such purposes the trustees shall have power from "time to time to mortgage all or such part or parts of the said "shares as they may think fit and/or to sell from time to time "all or any part or parts of the said shares at such prices on "such conditions and either by private contract or public "auction or on the Stock Exchange as the said trustees shall "in their absolute discretion think fit. . . . 5. Any moneys "paid by the trustees for the maintenance education advancement or benefit of the said John Stuart Hall may be paid "to the natural or other guardian or guardians for the time "being of the said John Stuart Hall by the trustees without "the necessity of the trustees seeing to the application "thereof or compelling the said guardian or guardians to "account for the same or any part thereof provided the "trustees are satisfied that the said John Stuart Hall is being "properly maintained and educated and that his advancement is not being neglected. . . . 7. Any trustee of this "settlement may from time to time with the consent of any "other trustee or trustees of this settlement delegate to "such other trustee or trustees all or any duty or duties "and/or power or powers and/or discretions by writing under "his hand only and without the necessity of it being under "seal with full power to revoke the same from time to time. "No trustee who has so delegated any such duty power or "discretion shall be personally liable for any loss incurred by "the trust property and occasioned by any act default or "omission of the said other trustee or trustees (to whom such "delegation has been made) in the exercise of such delegated "duty power or discretion. . . . 10. Upon the said John "Stuart Hall attaining the age of twenty-one years to transfer "to him as his absolute property all the property and assets "whatsoever including the accumulations of income and all "investments held by the said trustees under the trusts of this "indenture." The settlor died on June 27, 1921, and the respondent was his surviving executor. John Stuart Hall attained his majority on November 27, 1931, when the assets comprised in the settlement were transferred to him. From the time of the settlement the settlor never exercised any voting power in respect of the shares. Shortly after the date of the settlement, the trustees took out a policy of insurance on the life of John Stuart Hall in the sum of 10,000*l*, and paid the premiums in respect thereof out of the dividends and income received by them as trustees. With the exception of those premiums, no part of the dividends and income was paid or applied towards the infant's maintenance, advancement or benefit. Any balance which might have been so applied was accumulated and invested. The existence of the settlement was not disclosed when the settlor died, and accordingly the shares were not in any way taken into account when the final balance of his estate was valued for purposes of death duty. Upon a recent disclosure of the settlement, the Commissioner claimed that the shares formed part of the settlor's dutiable estate, and assessed additional death duty in respect thereof at the sum of 165*l*. 17*s*. The respondent paid under protest, and called on the Commissioner to state a case. The questions submitted for the decision of the court were three, but only one was in dispute, namely : Did the shares form part of the settlor's dutiable estate ?

Eleven other settlements, in the same form as the one under consideration on this appeal, had been made by the settlor in favour of his infant son. The commissioner made the same claim in respect of each, and notices of appeal in respect of each were served under the Act. It was, however, agreed between the parties that only the appeal which had brought the matter before their Lordships' Board should be proceeded with,

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and that the ultimate decision thereon should decide the others.

The Supreme Court of New South Wales (Jordan C.J., Rogers and Roper JJ.) answered the question in the affirmative. On appeal from that decision the High Court of Australia (Rich A.C.J., Starke, Dixon and McTiernan JJ.) set aside the judgment and order of the Supreme Court and answered the question in the negative.

1943. March 8, 9, 10. *Wynn-Parry K.C.* and *Stamp* for the appellant. The shares comprised in the settlement were the subject of a gift within the meaning of s. 100 of the Stamp Duties Act (1). The circumstance that the settlor is a trustee

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(1) By the New South Wales Stamp Duties Act, 1920: "100. In this part . . . . unless the context or subject-matter otherwise indicates or requires,— . . . . 'Disposition of property' means—(*a*) any conveyance, transfer, assignment, mortgage, delivery, payment, or other alienation of property whether at law or in equity; (*b*) the creation of any trust; . . . . 'Gift' means any disposition of property made otherwise than by will whether with or without an instrument in writing without full consideration in money or money's worth; . . . ."

"101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid—(*a*) upon the final balance of the estate of the deceased, as determined in accordance with this Act; and . . . ."

"102. For the purpose of the assessment and payment of death duty . . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property: (1.) (*a*) All property of the deceased which is situate in New South Wales at his death; and (*b*) all property of the deceased mentioned in the next succeeding section to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased. (2.) (*a*) . . . . (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever. (*e*)—(*l*)." [The lettered paragraphs other than (*d*) deal with classes of property which, like (*d*), could not fall within the class of property described in the first sub-section of s. 102, not being property "to which any person becomes entitled under the will or upon the intestacy of the deceased."]

103. [The estate of a deceased person whether domiciled at the

is by itself sufficient to bring about the result that the property must be deemed to be his—he is in possession as one of the trustees. If that point is good it disposes of the appeal in the appellant's favour. Whether the settlor was excluded from any benefit whatsoever as required by s. 102, sub-s. 2 (*d*), of the Act turns mainly on the construction of the settlement. The mere fact that the settlor remained in possession as one of the trustees results in his having a benefit within the meaning of that term as used in the section. Further, there is, on the true construction of the settlement, a resulting trust in favour of the settlor, and, therefore, apart from his position as trustee, there is a benefit under the settlement from which he has not been excluded. The plain scope and intention of the subsection is that, for the purpose of death duty, no property shall be taken out of the estate of the owner by a voluntary disposition unless he parts with it immediately for an interest which, irrevocably and wholly, excludes him from possession and enjoyment of it for the rest of his life, and that, if he retains any kind of benefit or interest, legal or equitable, during his life, the property remains a part of his estate for death duty. The disposition in favour of the donor's son passed to the son only a future and contingent right of enjoyment in possession, and in the meantime the donor retained a contingent beneficial interest inconsistent with any immediate possession or enjoyment by the son. Looking at the substance of the transaction, what the settlor clearly intended to deal with was the block of

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time of his death in or out of New South Wales is also to be deemed to include certain debts and shares notwithstanding that the same were not at the time of the death of the deceased bona notabilia within New South Wales.]

"104. The estate of a deceased "person constituted as provided "in the last two preceding "sections together with all . . . . "income, due or accruing due "or payable in respect thereof "and all accretions to the capital "thereof including the progeny "of live stock after the death of "the deceased and before grant "of administration, is in this "Act referred to as his dutiable "estate."

"105. (1.) The final balance "of the estate of a deceased "person shall be computed as "being the total value of his "dutiable estate (except such "part thereof as is the subject of "a separate assessment under the "next succeeding section) after "making such allowances as are "hereinafter authorized in respect "of the debts of the deceased.

"(2.) Subject to the preceding "section the principal value of the "property included in his dutiable "estate shall be estimated as at "the date of the death of the "deceased."

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shares. He intended to make a gift of them in a certain way, but if in the course of so doing some interest still remained in him, then he has made a gift of something less than the shares. This is a gift of all the shares in respect of which the son only has a limited and contingent interest. It is impossible to say, until the contingency has occurred, that the donor is excluded. The case is put under s. 102, sub-s. 2 (*d*), of the Act on the analogy of *Grey* (*Earl*) v. *Attorney-General* (1), for that subsection corresponds to s. 38, sub-s. 2 (*a*), of the Inland Revenue Act, 1881, as amended by s. 11 of the Customs and Inland Revenue Act, 1889, under which *Earl Grey's* case (1) was decided. There is no room for saying that what the settlor was dealing with in making the gift was an equitable or other interest in the shares less than the whole bundle of rights which comprise the shares. There is no ambiguity here. *Cochrane's* case (2) is against the appellant as to the effect of the undisposed of part. That case was commented on in *Attorney-General* v. *Glossop* (3) with a view to distinguishing it. In *Attorney-General* v. *Sandwich* (*Earl*) (4) Lord Sterndale M.R. said of *Cochrane's* case (2) that "it is inconsistent with *Attorney-General* v. *Worrall* (5);" it was also distinguished in *Revenue Commissioners* v. *O'Donohoe* (6). The legislation on which *Cochrane's* case (2) turned contained no definition of "gift" such as is in the Stamp Duties Act of 1920. It is submitted that *Cochrane's* case (2) is wrong, is inconsistent with *Earl Grey's* case (1) and *Worrall's* case (5) and ought not to be followed. Each case must be looked at separately, and the only safe general principle to proceed on is that if it be found that on the true construction of the instrument in question the settlor has not been entirely excluded from possession that is sufficient to render the property dutiable. To succeed on this point the appellant must satisfy the Board that the subject-matter of the gift was the shares and not an interest in them. *Attorney-General for Alberta* v. *Cowan* (7) is strongly in the appellant's favour. On the point that the donor was himself a trustee, this case falls under s. 102, sub-s. 2 (*d*). It is impossible to say that "bona fide possession and enjoyment" have been assumed by the donee in a case where the donor makes himself one of the trustees. If he is a trustee he retains part of the possession—the extreme case is the sole trustee. Next, having regard to the relationship of the parties the settlor will have a very distinct say in how this trust is to be administered, and there is room for it to be administered, and administered properly, in such a way that distinct advantages will or may accrue to the settlor. The final point, whether, apart from his position as trustee, any benefit accrued to the settlor, depends on the answer to the question, what was the gift ? The benefit was the resulting trust.

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(1) [1898] 2 Q. B. 534; [1900] A. C. 124.

(2) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

(3) [1907] 1 K. B. 163, 167, 172.

(4) [1922] 2 K. B. 500, 514.

(5) [1895] 1 Q. B. 99.

(6) [1936] I. R. 342.

(7) [1926] 1 D. L. R. 29.

Stamp following. The fundamental point is to what extent *Cochrane's* case (1) is right or wrong. If the result of a disposition is immediately to pass everything the donor had to the donee then the property is outside the section. But the intermediate case is where there is an asset of the settlor which ultimately passes and in respect of which he retains some interest in the meantime, then the section applies. This particular point is almost unbroken ground. The section must be given a meaning which is consistent with common sense, and it is submitted, with respect, that the construction put on it by the High Court in this case and by the court in *Cochrane's* case (1) is not really common sense. *Cochrane's* case (1) was rightly decided in respect of the annuity, and wrongly in respect of the reservation. The first proposition is that if an interest in the property to which the disposition relates is reserved or retained by the settlor or donor which has the effect of postponing or deferring the possession and enjoyment of the gift by the donee, liability under the section attaches. Secondly, the possession of the trustees cannot be disregarded. The case where the settlor is himself a trustee is reserved for special treatment under the Act, because it is recognized that if that is the position the complete possession and enjoyment has not been assumed by the donee. The retention of trusteeship prevents possession being taken by the donee and so lets in taxation under sub-s. 2 (*d*). Where there is a disposition under which more than one person is interested, whether trustees or beneficiaries, they must be treated as one donee for the purpose of applying this section. In this case the donor was a part of the donee (*a*) because he was one of the trustees, and (*b*) because he had a contingent interest in the income or a possible interest subject to a contingent defeasance

(1) [1906] 2 I. R. 200.

in the income ab initio. If *Cochrane's* case (1) is wrong, then the existence of an alternative right in the donor in this case arising if the child dies under twenty-one will prevent any inference of immediate enjoyment and possession in the child. On the facts here, the beneficial interest in the infant is that he may be maintained out of this fund, and he will, if he lives to twenty-one, get the corpus, but that does not give him immediate enjoyment of the shares as a whole free from any reserved interest in the donor.

Barton K.C. and *Danckwerts* for the respondent. *Cochrane's* case (1) has been followed in the High Court in Australia and also treated as an authority in New Zealand: *In re Adams* (2). If the decision in *Cochrane's* case (1) is right it completely covers this case, subject to the trustee point. This Act clearly contemplates that there may be a gift by the creation of a trust, and therefore the gift contemplated in the case of a trust is not merely the legal estate, but the beneficial interest. The fact that there is a reversion does not affect the life interest —he has possession and enjoyment. [Reference was made to *Grey (Earl)* v. *Attorney-General* (3) and to *Munro* v. *Commissioner of Stamp Duties* (4).] The latter case is in line with *Cochrane* (1). The plain object of the section is to prevent a donor in his lifetime from having actual benefit from the thing given. In this case the settlor in his lifetime had no benefit whatever. The Act means something real and tangible; "the benefit referred to means a tangible benefit from the "property": *Commissioner of Stamp Duties (N.S.W.)* v. *Thomson* (5). Not only was *Cochrane's* case (1) right, but in this case there was no retention whatever. [Reference was also made to *In re Adams* (6).] The possession referred to in the section is that which the beneficiary is capable of assuming, and when a trustee assumes possession he does not do so for himself but for and on behalf of his cestui que trust. The beneficiary must assume such possession as is capable of being assumed by him in all the circumstances of the case. Possession and enjoyment is a composite idea; it means beneficial possession of the interest given. In the case of an equitable interest the donee cannot in any event take possession and enjoyment of the whole property out of which the interest is carved. Had there been any intention to give any interest to the donor one would have expected some words of reservation, or some dealing with that interest. The deed itself vests so far as the law allows the whole of the property in the shares in the donee; the case comes within the doctrine of *In re Ussher. Foster* v. *Ussher* (1). There was a completely and immediately vested interest in the infant, and in that case no question could arise under the section because the whole interest had vested in the son. The same rules of construction apply to deeds as to wills: *Mostyn* v. *Brunton* (2).

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(1) [1906] 2 I. R. 200.
(2) [1932] N. Z. L. R. 741.
(3) [1900] A. C. 124.
(4) [1934] A. C. 61, 68.
(5) (1927) 40 C. L. R. 394, 418.
(6) [1932] N. Z. L. R. 741, 744.

Danckwerts following. The substance of the transaction must be looked at, and the possession of the trustees, which is purely legal possession in the case of a legal estate, cannot be beneficial, and the "bona fide possession and enjoyment" must be the beneficial ownership in the beneficiary.

Wynn-Parry K.C. in reply. *Munro* v. *Commissioner of Stamp Duties* (3) can be distinguished from this case. The word in the section is "possession" not "beneficial possession." Even if the phrase is a composite one, one part of it is "possession," and the beneficial part of the matter is dealt with by the word "enjoyment." None of the authorities has any relevance on the "vested interest" point, because there is no ambiguity in this deed. It was said in the argument in *Jopp* v. *Wood* (4) that "this is a case of a settlement, and "the authorities in regard to wills are inapplicable."

Apr. 15. The judgment of their Lordships was delivered by LORD RUSSELL OF KILLOWEN, who stated the facts, and continued: The answer to the question whether the shares formed part of the settlor's dutiable estate depends partly on the construction of the settlement, and partly on the construction of the Act. The Act must be considered in the form in which it stood at the date of the settlor's death, namely, the Stamp Duties Act, 1920, which was Act No. 47, 1920, and was assented to on December 31, 1920. [His Lordship referred to the relevant provisions of the Act of 1920.] Since authorities under the Finance Act, 1894, were cited and relied on in the courts of Australia, and also before their Lordships' Board, it will be convenient to set out the provisions in that Act which may be said to correspond with the relevant provisions of the Stamp Duties Act, 1920. It must, however, be borne in mind that the two Acts differ in this respect—that while the Stamp Duties Act taxes the final balance of the estate of the deceased, which is deemed to consist of defined classes of property, the Finance Act taxes property which passes on the death of a deceased, and property which is to be deemed to be included in the property passes on his death. Bearing this distinction in mind, the corresponding provisions of the Finance Act, 1894, would seem to be the following :—"2.—(1.) Property passing on the death of the "deceased shall be deemed to include the property following, "that is to say :—. . . .(*c*) Property which would be required "on the death of the deceased to be included in an account "under s. 38 of the Customs and Inland Revenue Act, 1881, "as amended by s. 11 of the Customs and Inland Revenue "Act, 1889, if those sections were herein enacted and extended "to real property as well as personal property, and the words "'voluntary' and 'voluntarily' and a reference to a "'volunteer' were omitted therefrom ; . . . . (3.) Property "passing on the death of the deceased shall not be deemed to "include property held by the deceased as trustee for another "person, under a disposition not made by the deceased, or "under a disposition made by the deceased more than twelve "months before his death where possession and enjoyment "of the property was bona fide assumed by the beneficiary "immediately upon the creation of the trust and thenceforward "retained to the entire exclusion of the deceased or of any "benefit to him by contract or otherwise." As is evident, it is necessary also to set out the two sections referred to in s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. Sect. 38 of the Customs and Inland Revenue Act, 1881 (hereinafter referred to as the Act of 1881), so far as relevant, runs as follows :— "38.—(1.) Stamp duties at the like rates as are by this Act "charged on affidavits and inventories shall be charged and "paid on accounts delivered of the personal or movable property to be included therein according to the value thereof. "(2.) The personal or movable property to be included in an "account shall be property of the following descriptions, "namely :—(*a*) Any property taken as a donatio mortis causa "made by any person dying on or after the first day of June, "1881, or taken under a voluntary disposition, made by any "person so dying, purporting to operate as an immediate gift "inter vivos whether by way of transfer, delivery, declaration

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(1) [1922] 2 Ch. 321.
(2) (1866) 17 I. Ch. R. 153.
(3) [1934] A. C. 61.
(4) (1860) 28 Beav. 53.

"of trust or otherwise, which shall not have been bona fide "made three months before the death of the deceased. . . . "(*c*) Any property passing under any past or future voluntary "settlement made by any person dying on or after such day "by deed or any other instrument not taking effect as a will, "whereby an interest in such property for life or any other "period determinable by reference to death is reserved either "expressly or by implication to the settlor. . . ." Sect. 11 of the Customs and Inland Revenue Act, 1889 (hereinafter referred to as the Act of 1889), so far as relevant, provides :— "11.—(1.) Sub-sect. 2 of s. 38 of the Customs and Inland "Revenue Act, 1881, is hereby amended, as follows :—The "description of property marked (*a*) shall be read as if the "word ' twelve ' were substituted for the word ' three ' therein, "and the said description of property shall include property "taken under any gift, whenever made, of which property "bona fide possession and enjoyment shall not have been "assumed by the donee immediately upon the gift and thence-"forward retained, to the entire exclusion of the donor, or of "any benefit to him by contract or otherwise. . . ."

As a result of this referential legislation, property passing on the death of a deceased is (under the Finance Act, 1894) deemed to include property falling within the words just cited. Under the Stamp Duties Act the estate of a deceased is deemed to include property falling within the very similar words of s. 102, sub-s. 2 (*d*), of that Act. There is no dispute, nor could there be any, that the settlement of December 7, 1917, was a gift within the meaning of the Stamp Duties Act, being, as it was, a disposition of property effected by the creation of a trust without full consideration in money or money's worth. The questions to be determined are, (1.) what was the property comprised in the gift, was it the shares themselves or only a particular kind of interest in the shares? (2.) Had bona fide possession and enjoyment been assumed by the donee immediately upon the gift? (3.) Had bona fide possession and enjoyment been thenceforth retained by the donee to the entire exclusion of the settlor, and to the entire exclusion of any benefit to him of whatsoever kind or in any way whatsoever?

In the Supreme Court, Jordan C.J. (with whose judgment Rogers and Roper JJ. concurred) was of opinion (1.) that "the "property comprised in the gift was the 850 shares" ; (2.) that, the donee being the trustees, bona fide possession and enjoyment of the property given was assumed immediately upon the gift; but (3.) the settlor was not after the gift excluded from possession of the property given, because he joined with his co-trustees in the receipt and application of dividends on the shares; nor was he entirely excluded from the enjoyment of the property given and from any benefit, because owing to the existence of a resulting trust he obtained, through the settlement, an equitable right to have the property revested in him, to the extent to which the rights of the son did not exhaust it, and to have it protected in the meanwhile. It will be noticed that the decision of the Supreme Court is based on the view that the gift was a gift of the shares, and that the donee of the gift was the body of trustees. In the High Court of Australia other views prevailed, the four learned judges being substantially unanimous in their opinions. Rich A.C.J. was of opinion that what was given was the beneficial interest in the shares created by the settlement, and that the donee was the son. "The gift in this case," he said, "was a gift to the son "by the creation of a trust for the beneficial interest in the "shares." (1). He held that the phrase "possession and "enjoyment" was a composite one, meaning beneficial possession and enjoyment, which the son immediately obtained under the trusts. He disagreed with the view of the Supreme Court that the settlor (by reason of his trusteeship) had not been excluded from possession, and (by reason of the resulting trust) had not been excluded from enjoyment or benefit. He considered that "possession of the legal interest in the "property comprised in the gift by the settlor as one of the "trustees and not in his capacity as beneficial owner was not "the possession aimed at by the sub-section and that, the "settlor having made a gift complete in itself without any "reservation or power of disposition over what was the subject "of the gift, he was entirely excluded from the enjoyment of "the property given and from any benefit of whatsoever "kind." (2). Starke J. was of opinion that the property comprised in the gift was not the 850 shares, but "the subject "given or the interests in the property created or limited by "the act of disposition of the property." (3). Nor was the settlor in possession in the sense contemplated by the Act, namely, "possession beneficial to himself" (4). He was "entirely excluded by the terms of the deed, and, in fact,

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(1) [1941] 64 C. L. R. 500.
(2) Ibid. 503.
(3) Ibid. 505.
(4) Ibid. 506.

"from possession of the property in the sense indicated, and "from the enjoyment thereof and of any benefit whatsoever "to him." (1). The resulting trust was not a benefit within the sub-section; the sub-section "is not attracted merely "because the donor has some interest in the property mentioned "in the gifts: he must retain some benefit out of the property "he affected to give or obtain some collateral benefit thereby." (2). Dixon J. confined his judgment to the consideration of two questions, the trusteeship of the settlor, and the resulting trust. As to the first, he thought that the words "possession and "enjoyment" mean beneficial possession and enjoyment as distinguished from possession and enjoyment in a representative or fiduciary capacity; therefore, by naming himself as a trustee a settlor or donor does not necessarily bring the gift within s. 102, sub-s. 2 (*d*), of the Act. That provision, he said, "appears to contemplate the assurance by way of gift of any "recognized estate or interest, whether legal or equitable, and "whether present, future or contingent, and to require that, "according to its nature, the estate or interest should pass into "the donee's enjoyment unimpaired by any reservation in "fact or law in favour of the donor. It may go even further, "but the provision does not, I think, insist that the donor "shall occupy no representative or fiduciary position in "relation to the subject of a trust amounting to or involving "a gift." (3). As to the resulting trust, he held that its existence did not mean that there was not an exclusion of every benefit to the settlor. There was no reservation out of the interest given, nor was there any recompense or benefit in reference to the interest given. McTiernan J. was of opinion that the property comprised in the gift was the equitable interest in the shares which passed to the son under the settlement, and that it was that interest of which the inquiry, whether bona fide possession and enjoyment had been assumed and retained at the time and in the manner required by s. 102, sub-s. 2 (*d*), was to be made. He held that the son had assumed and retained the full and complete possession and enjoyment of which the limited interest he took in the shares was capable, to the entire exclusion of the settlor except as a trustee. He further held that the fact that the settlor was a trustee did not make the section operate to sweep the shares into the settlor's estate; nor did the existence of a resulting trust prevent the settlor from being excluded from all benefit, because he had divested himself of the whole of the limited beneficial interest which he gave to his son.

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(1) 64 C. L. R. 500, 606.
(2) Ibid. 507.
(3) Ibid. 511.

In Australia the case was apparently argued on the footing that the interest of the son under the settlement in the shares and accumulations of income was not an absolute vested interest, but was contingent on his attaining the age of twenty-one years. Before their Lordships' Board, however, it was contended by the respondent that the interest given was an absolute one, and this on the authority of certain decisions on the construction of wills, of which *In re Ussher. Foster* v. *Ussher* (1) is perhaps the latest reported example. It is not necessary to consider in the present case whether these authorities should be applied to the construction of a settlement, for it was conceded that the authorities referred to only apply for the purpose of resolving an ambiguity in the gift. In their Lordships' opinion, there is no ambiguity in this settlement. There is no gift of corpus to the son except in the direction to the trustees to transfer to him on his attaining twenty-one. What have then (and only then) to be transferred are described as "all the property and assets "whatsoever including the accumulations of income and all "investments held by the trustees," and they are then to be transferred to him "as his absolute property." Until that event had happened they were not, in their Lordships' opinion, his abolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to corpus if and when he attained his age of twenty-one years.

For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee, seems immaterial.

(1) [1922] 2 Ch. 321.

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The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question therefore must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted. Did he assume it, and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: namely, (1.) the settlor had no enjoyment and possession such as is contemplated by the section; and (2.) such possession and enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants, was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son. Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly, yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed, this was ultimately conceded by the appellant.

Certain authorities were cited or referred to in the courts in Australia, and these now require consideration. Reliance was placed in the High Court on the decision of the courts in Ireland in *In re Cochrane* (1), the facts in which were these: Sir Henry Cochrane was the mortgagee of two estates in County Mayo, the mortgage being one to secure a principal sum of 15,000*l.*, with interest at 4½ per cent. The mortgage debt and securities having been vested in trustees, Sir Henry (by an indenture dated September 4, 1902, and made between himself and the trustees) declared trusts of the 15,000*l.* The trustees were to stand possessed thereof and all interest and the benefit of all securities for the same in trust out of the income to pay each year 575*l.* to Sir Henry's daughter, Mrs. Day, for her life, and after her decease in trust as to the said sum of 15,000*l.* for her issue as she should by deed or will appoint, and in default of appointment for her children who, being sons, should attain twenty-one, or, being daughters, should attain twenty-one or marry. Power was given to Mrs. Day to appoint by will to her husband for his life a yearly sum not exceeding 300*l.* out of the income of the 15,000*l.* If no child of Mrs. Day should attain a vested interest in the trust funds, they were to be held in trust for Sir Henry absolutely. There was also a trust of the balance of the yearly income for Sir Henry absolutely. The trustees regularly received the interest, which amounted to 675*l.* per annum. They paid 575*l.* to Mrs. Day and the balance to Sir Henry; but in March, 1904, Sir Henry directed them to pay in future the whole income to Mrs. Day. He died in September of the same year. The Crown thereupon claimed that estate duty was payable in respect of the entire sum of 15,000*l.* as property deemed to be included in property passing on the death of Sir Henry within s. 2, sub-s. 1 (*c*), of the Finance Act, 1894. The question at issue was whether the case fell within s. 38, sub-s. 2 (*a*), of the Act of 1881, as amended by s. 11 of the Act of 1889, in other words, was the 15,000*l.* property taken under a gift, of which property bona fide possession and enjoyment had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise? The Court of Appeal held (affirming the King's Bench Division) that estate duty was not payable in respect of the 15,000*l.*, but only in respect of the values of Sir Henry's interest in the balance of income and his contingent interest in the 15,000*l.* Palles C.B. thought that the Crown's contention would be right if the subject-matter of the gift was the entire equitable interest in the 15,000*l.* The question was whether that was correct in law, a question which turned on the word "gift." Gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift. He held, therefore, that estate duty was not payable in respect of the 15,000*l.* Kenny and Johnson JJ. took the same view. In the Court of Appeal, Walker L.C., and FitzGibbon and Holmes L.JJ.

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(1) [1905] 2 I. R. 626; [1906] 2 I. R. 200.

unanimously affirmed this decision. FitzGibbon L.J., after stating that he agreed with and adopted the argument of the Lord Chief Baron, pointed out that Sir Henry gave the annuity absolutely to his daughter and the fund to her children absolutely in certain events, "but nothing over that, whether you "call it a reversion, a reservation, or a surplus, was included in "the gift." (1). If *In re Cochrane* (1) was rightly decided, as their Lordships think it was, it covers the present case. It was, however, contended by the appellant that the decision was wrong and was inconsistent with (1.) the decision of the House of Lords in *Grey* (*Earl*) v. *Attorney-General* (2), which affirmed the decision of the Court of Appeal (3) and (2.) the decision of the Court of Appeal in *Attorney-General* v. *Worrall* (4). To these decisions reference must now be made.

The case of *Earl Grey* (2) was one of a gift not made by the creation of a trust, but by direct conveyance and assignment to the donee of the donor's real and personal estate. It arose in the following circumstances: The donor was the third Earl, the donee was the heir presumptive, who in fact succeeded to the earldom on the death of the third Earl. The donor was absolute owner of some freehold and leasehold estates, subject to certain annuities charged thereon and certain mortgages affecting the same. The gift was effected by an indenture, dated October 19, 1885, and made between the donor of the one part and the donee of the other part. This deed is stated (inaccurately) in the Law Reports to have excepted the mansion house from the real property conveyed to the donee, but a reference to the copy supplied to the House of Lords shows that it was included. The relevant contents of the deed were the following: By cl. 4 the donor conveyed to the donee all the donor's real estate and leaseholds to hold the same to the donee in fee simple (subject to the said annuities and mortgages) to the use that the donor should receive during his life an annual rentcharge of 4000*l.* to be issuing out of the said hereditaments (other than such part as the donor was to occupy under the trusts thereinafter declared) and subject thereto and charged therewith to the use of the donee in fee, but as to the mansion house at Howick and the premises to be enjoyed therewith subject to the trusts thereinafter contained and as to leaseholds for the whole term and interest of the donor therein. By cl. 5 the donor assigned to the donee the

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(1) [1906] 2 I. R. 200, 203.
(2) [1900] A. C. 124.
(3) [1898] 2 Q. B. 534.
(4) [1895] 1 Q. B. 99.

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furniture and effects in or about the mansion house and (with immaterial exceptions) all other his personal estate. By cl. 6 trusts were declared of the mansion house with the gardens, stables, outbuildings and appurtenances as then occupied and enjoyed by the donor, and of the furniture and effects in the words following: "upon trust to permit him [the donor] "to occupy and enjoy the same as freely as heretofore during "his life, and all the furniture . . . . and other things whatever "in or about the said mansion house and premises shall be "held upon trust to permit the said Earl to use and enjoy the "same in like manner during his life." It will thus be seen that the whole of the donor's real and leasehold estates were conveyed to the donee, but in his hands they had imposed on them by the donor an annual rentcharge for the benefit of the donor issuing out of them (but not out of the mansion house and its appurtenances) during the life of the donor, and (as to the mansion house and its appurtenances) a trust for the benefit of the donor during his life. The deed also contained covenants by the donee with the donor (1.) to pay the rentcharge; (2.) to keep the mansion house insured and repaired, and to stock and manage the gardens; (3.) to supply the donor free of cost with farm produce; and (4.) to pay the donor's funeral and testamentary expenses and debts to the full exhaustion of the property. The deed further contained a proviso that if the donee died in the lifetime of the donor, or committed a breach of covenant, the donor should have power to revoke the deed wholly or in part. The annual income of the property comprised in the deed largely exceeded 4000*l*. By an indenture, dated September 26, 1894, and made between the same parties, in consideration of a sum of 5000*l*. paid by the donee to the donor, the donor released the properties conveyed by the former indenture from the annual rentcharge, and from the power of revocation. He also released the donee from his covenant to pay the rentcharge. He died about a fortnight afterwards, namely, on October 9, 1894. The Crown claimed duty under s. 2, sub-s. 1(*c*), of the Finance Act, 1894, alleging that the case fell within s. 38, sub-s. 2 (*a*), of the Act of 1881 as amended by s. 11, sub-s. 1, of the Act of 1889, or within s. 38, sub-s. 2 (*c*), of the Act of 1881. In the Court of Appeal A. L. Smith L.J., relying on the covenants by the donee to pay the donor 4000*l*. a year and to bear other liabilities of the donor, held that the donee had not assumed bona fide possession and enjoyment of the estate immediately upon the gift and thenceforward retained possession and enjoyment of the property contained in the deed either to the entire exclusion of the donor or of any benefit by contract or otherwise to the donor. Rigby L.J. referred to the rentcharge in favour of the donor, to the donor's beneficial interest in the property which was not subject to the rentcharge, to the covenants by the donee and to the power of revocation, and said that it was impossible to say that the property subject to the deed was held by the donee to the exclusion of any benefit to the donor. Vaughan Williams L.J. thought that the case fell within the later words of s. 11, sub-s. 1, of the Act of 1889. The covenant by the donee to pay the donor's debts prevented the gift from being one of which the donee assumed possession and enjoyment to the total exclusion of benefit to the donor. The decision of the Court of Appeal is based entirely on s. 38, sub-s. 2 (*a*), of the Act of 1881 as amended, and not on s. 38, sub-s. 2 (*c*), of that Act. The last-mentioned provision, they said, they need not consider. In the House of Lords, the donee's appeal met with short shrift. The case was disposed of at one sitting, the Crown not being called on to argue. Lord Halsbury L.C., in stating his opinion (which was unreserved in more senses than one), thought the case a very plain one. His actual words are these (1): "My Lords, there are some cases so extremely "plain that it is difficult to give any better exposition of the "question than that which the statute itself provides. In the "present case I did not at first quite understand the argument "presented to your Lordships, and I am not absolutely certain "that I have got much further now; but at all events, forming "my own judgment upon the statute, nothing appears to me "much more plain than this, that what the Act of Parliament "intended to prevent was that what has been described as a "gift inter vivos should nevertheless reserve to the settlor "some benefit, or some part of that which purported to be "given inter vivos. In this case can anybody doubt that "something has been reserved to the settlor? The settlement "itself has reserved 4000*l*. a year, and has reserved a right also "on the part of the settlor that all his debts up to the period "of his death should be paid, and the payment secured by the "estate. It seems to me that it is burning daylight to say "that is not within the express language of the statute, and I "am really wholly unable to understand why these words are "not as plain in the statute itself as any explanatory exposition

(1) [1900] A. C. 126.

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"could make them. That, my Lords, is really all I have to "say upon the subject. It seems to me it is a particularly "plain case, and I move your Lordships that this appeal be "dismissed with costs." It will be observed that by the use of the word "reserved" the Lord Chancellor might perhaps appear to be basing his opinion on the view that the case fell within s. 38, sub-s. 2 (*c*), as a case of property passing under a settlement whereby an interest in such property for life was reserved to the settlor. If this were so, then (the argument runs) *In re Cochrane* (1) is inconsistent with this decision, because there can be no difference in substance between (*a*) the case of a gift of property (and its income) to A coupled with a charge on the property of an annual sum in favour of the donor, and (*b*) the case of a gift (through the medium of trustees) to A for life of part only of the annual income of a trust fund, leaving the balance to be paid to the donor either under a resulting trust or an express trust in that behalf. In each case it can be said that the 4000*l*. a year, or the balance of income, is excluded from the gift. *In re Cochrane* (1) decided that in case (*b*) nothing was reserved out of the gift; but in case (*a*) *Grey* (*Earl*) v. *Attorney-General* (2) decided that the rentcharge was reserved out of the property passing under the gift. Therefore *In re Cochrane* (1) is wrong. That is the argument.

Their Lordships do not accept this contention. In the first place, they do not think that *Grey* (*Earl*) v. *Attorney-General* (2) was decided on any ground other than that on which the decision of the Court of Appeal was based, namely, that the case fell within s. 38, sub-s. 2 (*a*), as amended, because bona fide possession and enjoyment of the property taken under the gift had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The whole transaction reeked of benefits to the donor, some arising out of the property actually conveyed and assigned by way of gift to the donee, others arising out of covenants entered into by the donee collaterally and in reference to the gift. The Lord Chancellor refers, their Lordships think, to all these benefits as showing that the case fell plainly within the provisions of s. 38, sub-s. 2 (*a*), of the Act of 1881, as amended. The learned judges who decided *In re Cochrane* (1) all thought that *Grey* (*Earl*) v. *Attorney-General* (2) was clearly distinguishable, and their Lordships agree that it was. There is nothing

(1) [1906] 2 I. R. 200.
(2) [1900] A. C. 124.

laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11, sub-s. 1, of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires. With the suggestion that *In re Cochrane* (1) is inconsistent with the decision in *Attorney-General* v. *Worrall* (2) their Lordships cannot agree. That was simply a case in which the Court of Appeal held on the facts and documents there disclosed that the donor had obtained a collateral benefit in reference to the gift which he had made. Possession and enjoyment of the property taken under the gift had not been assumed and retained to the exclusion of any benefit to the donor by contract or otherwise.

Only one other case, which was referred to in the Australian Courts, need be referred to, namely, *Attorney-General for Alberta* v. *Cowan* (3). In that case the owner of some negotiable securities declared trusts thereof for certain persons, and retained possession as sole trustee. It was held that although his possession was in law the possession of the cestuis que trust there had not been an assumption of possession by the beneficiaries sufficient to take the property out of s. 6 (*b*) of the Succession Duties Act, R. S. A. 1922, c. 28, and that therefore the property was liable to succession duty. Duff J. (who delivered the judgment of the Supreme Court of Canada) was of opinion that the section in question contemplated possession by beneficiaries as contradistinguished from possession by the donor, and not a possession which was in fact that of the donor, and was attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries was created. The basis of that decision has no relevance to a case such as the one under consideration, in which the possession of the donor is changed to the possession of a body of trustees. In such a case there is a possession by the beneficiaries as contradistinguished from the possession of the donor, and not less so if the donor is himself one of the body of trustees.

(1) [1906] 2 I. R. 200.
(2) [1895] 1 Q. B. 99.
(3) [1926] 1 D. L. R. 29.

One argument addressed to their Lordships by counsel for the appellant must be noticed. It was contended (first) that s. 102, sub-s. 1 (*a*), of the Stamp Duties Act, 1920, when closely studied, revealed the fact that property vested in a deceased person as trustee for another person under a disposition made by the deceased, was to be deemed included in the estate of the deceased for the purposes of assessment and payment of death duty; (secondly) that the only niche into which such property could be fitted was sub-s. 2 (*d*); therefore (thirdly) the Act could not have contemplated that the requirements of sub-s. 2 (*d*) as to excluding the deceased donor from possession and enjoyment would be complied with when the donor was himself a trustee. Their Lordships find it difficult to follow this over-subtle argument, but they think it breaks down in its initial stage. The first proposition is founded on the exception contained in sub-s. 1. The exception purports to be an exception from "all property of the deceased . . . . to "which any person becomes entitled under the will or upon "the intestacy of the deceased," words which can only mean property of which the deceased was the owner; the exception, however, is of property of which the deceased was a trustee. The argument is that in order that the exception may not be meaningless, you must attribute to sub-s. 1 (*a*) the effect of including in the words cited above property of which the deceased was a trustee if he was a trustee under a disposition made by himself. Their Lordships, however, feel unequal to the task of holding that the words cited above can refer to trust property at all: they prefer to treat the exception as having no operative effect. Indeed, the words seem to have found their way into s. 102, sub-s. 1 (*a*), from s. 2, sub-s. 3, of the Finance Act, 1894, quoted earlier in this judgment. In that setting the words of exception were necessary and proper, because under that Act estate duty was payable, not on "all "property of the deceased . . . . to which any person becomes "entitled under the will or upon the intestacy of the deceased," but on "property passing on the death of the deceased"; and property vested in a deceased person as a trustee would undoubtedly pass on his death. In any event, even if the argument under consideration were sound, the only case which could possibly fit the words would be the case (which is not the present case) when the deceased was sole trustee, for by no stretch of imagination can it be said of property vested in several trustees, that on the death of one, the surviving trustees became entitled to it under the will or upon the intestacy of the one who died.

For the reasons indicated, their Lordships are of opinion that bona fide possession and enjoyment of the property comprised in the gift which the deceased made by the settlement of the shares was assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever, and that the question in dispute should be answered in the negative. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. In accordance with the agreement entered into when special leave to appeal was obtained, the appellant will pay the respondent's costs of the appeal.

Solicitors for appellant: *Light & Fulton.*
Solicitors for respondent: *Burton, Yeates & Hart.*

[HOUSE OF LORDS.]

H. L. (Sc.)*
1943
Jan. 28, 29;
Apr. 16.

GLASGOW CORPORATION . . . . . APPELLANTS;

AND

MUIR AND OTHERS . . . . RESPONDENTS.

Negligence—Public tea room and shop—Shop crowded with children—Tea urn carried through with leave of manageress—Urn upset and children scalded—Liability of owners of premises.

The manageress of a public tea room, to which access was obtained by way of a small shop, allowed two members of a picnic party to carry through the shop an urn containing several gallons of boiling tea, about a dozen children being then at the shop counter buying sweets and ices. For a reason which was not explained, the hold of one of the bearers slipped so that tea was spilt and scalded several children, on whose behalf an action was brought against the owners of the premises:—

Held, (I.) that the manageress was bound to take such reasonable care as would avoid risk of injury to such persons as she could reasonably foresee might be injured by failure to exercise such care and that, in the circumstances, the standard of care owed by the bearers of the urn was at least as high as that owed by the manageress; (2.) that the careful carriage of the urn past the children involved no such danger as could have been foreseen by an ordinary reasonable person as a natural and probable consequence, so as to lead him to clear the children out of the passage; (3.) that in any event the action must fail since it had not been proved what was the cause of the accident.

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* *Present:* LORD THANKERTON, LORD MACMILLAN, LORD WRIGHT, LORD ROMER and LORD CLAUSON.

Decision of the First Division of the Court of Session, 1942 S. C. 126, reversed.

Appeal from the Court of Session.

The facts, stated by Lord Thankerton, Lord Macmillan and Lord Wright, were as follows: The action arose out of an accident to six young children on June 15, 1940, in the old mansion house in the King's Park, Glasgow, which belonged to the appellants. At that time the mansion house was being used (inter alia) for the service of teas to visitors to the park and also as a shop for the sale of sweets and ices. The witness, Mrs. Emily Alexander, was manageress of the tea rooms and shop on behalf of the appellants, and the action was based on the alleged negligence of Mrs. Alexander in breach of a duty to take reasonable care of the children. After a proof before answer, the Lord Ordinary, Lord Robertson, on June 6, 1941, assoilzied the appellants, but his interlocutor was recalled by the First Division of the Court of Session, the Lord President dissenting, by interlocutor dated November 7, 1941, and, the amount of damages having been agreed subject to reservation of the defenders' right to bring an appeal to the House of Lords, decree was given for the agreed amounts by interlocutor dated December 2, 1941. At the hearing of the appeal the question of liability was alone argued.

About 200 yards from the mansion house, at the top of a hill, there was a shelter, for the convenience of picnic parties and the general public, at the back of which there was a boilerhouse where picnic parties could obtain, for a moderate charge, boiling water to make their tea. Weather permitting, the usual practice was for the picnic parties to eat their tea in the field which lay between the shelter and the mansion house. On the day of the accident, it had come on very wet in the afternoon, and there were at least two picnic parties who desired shelter. One of these, which came from Rutherglen, was a large one, comprising 650 children and 250 adults. The other party, which came from Milton Street Free Church, consisted of 30 or 40 persons, including George McDonald, the church officer. The larger party having absorbed the

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accommodation in the shelter, two members of the church party went down to the mansion house, and obtained permission from Mrs. Alexander to use the tea room in the mansion house for eating their own tea, at a charge of 12*s.* 6*d.* Thereafter, the church party brought their tea urn and their eatables to the mansion house. A short flight of steps led up to the double doors by which entry was obtained to the entrance hall or passage running towards the tea rooms on the left hand. Immediately opposite, on the other side of the passage, was the counter at which the sweets and ices were sold, and, in continuation of the line of the counter, there was a showcase. The counter was about five feet long and the showcase was over three feet long. Between the doorway—ignoring the space necessary for the inward opening of the doors—and the counter the space was nearly five feet wide, but, as one turned left-handed to proceed to the tea room, the space narrowed on the left side until, opposite the inmost end of the showcase, there was only three feet three inches of passageway, at which width the passage continued so far as was material to the present case. The tea urn of the church party was carried so far down the hill by George McDonald and a boy Murray abreast, the cakes being carried by another member, James Taylor. Before they reached the mansion house, Taylor took Murray's place, McDonald having one handle, and Taylor the other. At the entrance door, they found it necessary to proceed in single file, Taylor having the front handle and McDonald the back handle. At the time of their entry there were about a dozen children from the other party, who were buying sweets or ices at the counter. Just after Taylor and McDonald had turned left-handed, McDonald let go the handle by which he was carrying the urn, and some scalding hot tea escaped from the urn and injured the six children referred to, Eleanor Muir, in particular, sustained serious injuries. No witness was produced who saw the accident happen. Taylor, although he felt McDonald let go his handle and was able to get the urn on to its base on the floor before it completely overturned, could give no competent evidence as to why McDonald let go. The evidence of the witness Jeffrey, curator of the park, as to the cause of the accident was equally incompetent. Mrs. Alexander, who was serving the children at the counter, had her back turned when it happened, as she was taking ice cream from the freezer. None of the children saw it happen. Neither McDonald nor

Murray was produced as a witness, and no explanation was given of their absence. In the course of her evidence Mrs. Alexander stated that she expected she would have been warned when the urn was brought into the shop where the children were, and that, if she had been warned, she "certainly "would have got them away from the entrance at the doorway." Taylor, in evidence, stated that the bearers asked the children to stand aside, that they stood aside, and that he got safely past them.

In the averments of the pursuers (the respondents) in condescendence 3, they stated: "The said urn, which was at "least two feet in height, when filled with hot tea was a heavy "load, and difficult to carry not only because of its weight "but owing to the risk of some of the hot liquid coming in "contact with the hand of a person carrying it and so causing "him to drop his side of the urn. It is believed and averred "that this occurred on the occasion of the accident. The "carrying of the said urn with its contents through said shop "created a serious danger particularly when being carried, as "it was, through a narrow passage near a crowd of persons "including many children. It is believed and averred that "the defenders and their servants in said premises had over "a long period of time prior to the said accident, and particularly "when on wet days parties of people were accustomed to "congregate inside said tea room instead of in the park, "allowed and encouraged the practice of carrying large urns "of hot tea or water into said premises. . . . . The said "accident was the natural and probable result of the defenders' "permitting the said urn to be brought on to their premises "in the circumstances condescended on, and of their failure "to protect the said children therefrom." Subsequently, it was not disputed that this was the first occasion on which an urn was brought into the tea room. It was also proved, by the respondents' own evidence, that the urn in question was a cylindrical vessel with a fitting lid, was made of light sheet metal about one eighth of an inch thick and was about sixteen inches high and about fifteen inches in diameter with an external over-all width, including the handles, of about eighteen inches, that its capacity was over nine gallons, that it weighed at most about one hundred pounds, with the quantity of tea which it contained, that it was of an ordinary type, and that, if carried carefully, it involved no danger. On the evidence, it appeared that, at the time of the accident, the urn was, at the most, not more than two-thirds full.

Blades K.C. and *Montgomery* for the appellants. In such a case as this the owner or occupier of premises does not insure the safety of those he invites there. His duty is to exercise reasonable care to prevent damage from dangers of which he knows or should know. He is not bound to take precautions against risk of dangers which are not apparent to persons of ordinary intelligence and prudence. There is no principle of law which makes him responsible for an accident resulting from an operation which is not inherently dangerous and does not hold the possibility of danger to a reasonable person if prudently and carefully carried out. Accordingly, the question in the present case is whether the carrying of the tea urn in the circumstances disclosed by the evidence was so obvious a danger that it should have been apparent to Mrs. Alexander as a person of ordinary intelligence and prudence that the risk to the children required her to take special precautions. There was no obvious risk compelling her to foresee the events which happened. The urn was not a thing dangerous in itself. The carrying of it, even in the circumstances of this case, was not an act involving a risk, if it was done carefully and properly. It could not have been foreseen by a person of ordinary intelligence and prudence that McDonald would allow the handle to slip. In these circumstances there was no duty on Mrs. Alexander to clear the children out of the way. Further, the respondents did not show how the accident happened, and, therefore, they could not attribute any blame to the appellants, for, if the cause had been established, it might have shown clearly that there was no fault on their part. [They referred to *Indermaur* v. *Dames* (1), *Dolan* v. *Burnet* (2); *O'Keefe* v. *Edinburgh Corporation* (3); and *Davidson* v. *Aberdeen Magistrates* (4).]

Duffes K.C. and *James Walker.* The appellants in conducting the sweet shop owed their customers a duty to do so safely. Their duty to take precautions was not limited to obvious risks, but extended to taking proper precautions against risks which were reasonably appreciable by a reasonable man in such a position. Their manageress, acting on their behalf, failed to take reasonable care for the safety of their customers and the

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(1) (1866) L. R. 1 C. P. 274, 287.
(2) (1896) 23 R. 550, 556.
(3) 1911 S. C. 18, 21.
(4) (1919) 2 S. L. T. 213.

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children were injured in consequence. When the tea urn was allowed to be carried through the shop, a new and unusual enterprise was introduced. Carrying it through a shop crowded with children was a matter of some difficulty. It should have been obvious to Mrs. Alexander that there was a reasonable probability that some hot tea would be spilt on them in one of many possible ways. A duty lay on her to take steps and exercise supervision which she did not attempt to take or to exercise, nor did she give any sufficient warning. It is no defence to the appellants to ask the court to assume that the actual cause of the mishap was something much less likely than some other potential cause of damage which they should have foreseen. Assuming that the court was satisfied that the situation called for certain precautions (whatever they were) which were not taken, and that, if they had been taken, the children could not have been injured, the failure to take those precautions was the cause of the children being injured and on that liability depends. From the standpoint of the reasonable man no precautions were sufficient or satisfactory save putting the children out of the range of the hot tea and away from the danger of having it spilt on them. The appellants, in fact, took no precautions. The liability of the appellants rests on these considerations: (1.) Having regard to the nature of the place as a sweet shop and the work usually done there, the introduction of the urn completely changed it from being a safe place for children to being a dangerous place for children, who were entitled to have a shop free from danger of that character or else to be warned of the danger and protected against it by the appellants, the latter, with regard to the presence of the children in the shop, being in a quasi-contractual relationship; (2.) there was a duty on someone to take care to protect the children from the risk of being scalded, and, if anyone had such a duty, the appellants had; (3.) if the appellants did not warn them of the risk and if an effective warning would have prevented injury to them, the appellants are liable. [They referred to *Hughes* v. *Percival* (1); *Dolan* v. *Burnet* (2); *Brooke* v. *Bool* (3); *Honeywill & Stein, Ld.* v. *Larkin Brothers (London Commercial Photographers), Ld.* (4); *Cox* v. *Coulson* (5); and *Lindsey County Council* v. *Marshall* (6).]

(1) (1883) 8 App. Cas. 443, 451.
(2) 23 R. 550.
(3) [1928] 2 K. B. 578.
(4) [1934] 1 K. B. 191.
(5) [1916] 2 K. B. 177.
(6) [1937] A. C. 97.

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The House took time for consideration.

Apr. 16. LORD THANKERTON. My Lords, on a careful consideration of the opinions in the courts below, it appears to me to be accepted by the parties and by all the learned judges that there rested on Mrs. Alexander, as representing the appellants, a duty to take reasonable care for the safety of the children who had come on to the premises to purchase sweets and ices. There was, however, a serious difference between the three learned judges who formed the majority in the First Division, on the one hand, and the Lord President and the Lord Ordinary, on the other hand, as to the standard of care which the circumstances imposed on Mrs. Alexander. I shall state the test by which, in my opinion, the standard of care is to be judged, and this I will do by two quotations from the recent decision of this House in the Scottish case of *Bourhill* v. *Young* (1). I take from my own opinion (2), that the duty is to take "such reasonable care as will avoid the "risk of injury to such persons as he [in that case a motor-"cyclist] can reasonably foresee might be injured by failure "to exercise such reasonable care," and from the opinion of my noble and learned friend Lord Macmillan (3): "The duty "to take care is the duty to avoid doing or omitting to do "anything the doing or omitting to do which may have as its "reasonable and probable consequence injury to others, and "the duty is owed to those to whom injury may reasonably "and probably be anticipated if the duty is not observed." In my opinion, it has long been held in Scotland that all that a person can be held bound to foresee are the reasonable and probable consequences of the failure to take care, judged by the standard of the ordinary reasonable man. I am unable to agree with Lord Carmont (4) that the appellants could be made liable "even if it were proved that the actual damage "to the invitee happened through the tea urn being spilt in "a way that could not reasonably have been anticipated." Further, this is essentially a jury question, and, in cases such as the present one, it is the duty of the court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary. The court must be careful to place itself in the position of the person charged with the duty and to consider what he or

(1) [1943] A. C. 92.
(2) Ibid. 98.
(3) Ibid. 104.
(4) 1942 S. C. 126, 140.

she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened or that witnesses in the witness box are prone to express regret, ex post facto, that they did not take some step, which it is now realized would definitely have prevented the accident. In my opinion, the learned judges of the majority have made far too much of that which Lord Moncrieff (1) regarded as an admission by Mrs. Alexander. It is not an admission in the sense that it can bind the appellants, though it may be of some evidential value as to what the ordinary person would regard as a reasonable standard of care. For myself, I regard it of little value in view of what I have said above, in assisting the court to form its conclusion, as a jury, as to the reasonable standard of care. I also am of opinion that Lord Moncrieff is not justified in regarding the event as demonstrating the risk, and that, in particular, because there is no evidence as to why McDonald let go his handle—but I will deal with this aspect of the case later—in other words, what event it was that caused the accident.

The ground of the majority judges, as I understand it, is that Mrs. Alexander, while authorizing the transport of the tea urn through the entrance passage where the sweets and ices were being sold to a large number of children, omitted to remove the children altogether from the passageway so as to avoid a danger which should have been obvious to her. In my opinion, this is to turn Mrs. Alexander into something like an insurer against any risk of danger from the tea urn. On the evidence, it is established, as I have already stated, that, if carefully carried, there was no element of danger to be reasonably anticipated from the operation of carrying the urn. Differing from Lord Carmont, I am clearly of opinion that the standard of care owed by the two persons in charge of the urn to the children was at least as high as that owed by Mrs. Alexander. They were even more cognizant than Mrs. Alexander of the position in the passageway when they entered it with the urn. Mrs. Alexander knew nothing that they did not know, and the point taken by Lord Carmont that they had no authority to make the children stand aside appears to me to be immaterial, as, on failure of the children to stand aside, they had only to ask Mrs. Alexander to attend to it, and to put down the urn until sufficient space was cleared,

(1) 1942 S. C. 126, 134.

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but, on the evidence of the pursuers' witness Taylor, they did ask the children to stand aside and the children had cleared sufficient space to enable him to get comfortably past them. There is no evidence that it was any want of care on the part of McDonald that caused the accident or that the children hustled him and caused him to let go. There may have been some cause, such as a physical failure on McDonald's part, which he—and still less Mrs. Alexander—could not possibly have foreseen. I am not prepared to find that the careful carriage of the tea urn past the dozen or so of children in the wider end of the passage involved such an obvious danger as would have been foreseen as a natural and probable consequence of such carriage by an ordinary reasonable person which would lead him to clear the children out of the passage, but, further, let me make it quite clear that, even on the contrary view, I would hold that the respondents must fail here as they have not proved what the event was that caused the accident. If the truth were that the accident was caused by some unexpected physical failure on McDonald's part it is not enough for the pursuers to say that, if the children had been removed, the accident could not have happened. That would be to make Mrs. Alexander, on behalf of the appellants, an insurer. Though I have expressed the tests of the standard of duty in my own way, I agree substantially with the opinions of the Lord President and Lord Robertson. It follows that the appeal should be allowed, that the interlocutors of the First Division should be recalled, and that the interlocutor of the Lord Ordinary dated June 6, 1941, should be restored. The appellants should have the costs of this appeal and their expenses in the Inner House. I move accordingly.

Lord Macmillan. My Lords, the degree of care for the safety of others which the law requires human beings to observe in the conduct of their affairs varies according to the circumstances. There is no absolute standard, but it may be said generally that the degree of care required varies directly with the risk involved. Those who engage in operations inherently dangerous must take precautions which are not required of persons engaged in the ordinary routine of daily life. It is, no doubt, true that in every act which an individual performs there is present a potentiality of injury to others. All things are possible, and, indeed, it has become proverbial that the unexpected always happens, but, while the precept alterum non laedere requires us to abstain from intentionally injuring others, it does not impose liability for every injury which our conduct may occasion. In Scotland, at any rate, it has never been a maxim of the law that a man acts at his peril. Legal liability is limited to those consequences of our acts which a reasonable man of ordinary intelligence and experience so acting would have in contemplation. "The "duty to take care," as I essayed to formulate it in *Bourhill* v. *Young* (1), "is the duty to avoid doing or omitting to do "anything the doing or omitting to do which may have as its "reasonable and probable consequence injury to others, and "the duty is owed to those to whom injury may reasonably "and probably be anticipated if the duty is not observed." This, in my opinion, expresses the law of Scotland and I apprehend that it is also the law of England. The standard of foresight of the reasonable man is, in one sense, an impersonal test. It eliminates the personal equation and is independent of the idiosyncrasies of the particular person whose conduct is in question. Some persons are by nature unduly timorous and imagine every path beset with lions. Others, of more robust temperament, fail to foresee or nonchalantly disregard even the most obvious dangers. The reasonable man is presumed to be free both from over-apprehension and from over-confidence, but there is a sense in which the standard of care of the reasonable man involves in its application a subjective element. It is still left to the judge to decide what, in the circumstances of the particular case, the reasonable man would have had in contemplation, and what, accordingly, the party sought to be made liable ought to have foreseen. Here there is room for diversity of view, as, indeed, is well illustrated in the present case. What to one judge may seem far-fetched may seem to another both natural and probable.

With these considerations in mind I turn to the facts of the occurrence on which your Lordships have to adjudicate. Up to a point the facts have been sufficiently ascertained. They have been recounted by my noble and learned friend, Lord Thankerton. The question, as I see it, is whether Mrs. Alexander, when she was asked to allow a tea urn to be brought into the premises under her charge, ought to have had in mind that it would require to be carried through a narrow passage in which there were a number of children and that there would be a risk of the contents of the urn being spilt and scalding some of the children. If, as a reasonable person, she ought to have had these considerations in mind, was it her duty to require that she should be informed of the arrival of the urn, and, before allowing it to be carried through the narrow passage, to clear all the children out of it in case they might be splashed with scalding water? The urn was an ordinary medium-sized cylindrical vessel of about fifteen inches diameter and about sixteen inches in height made of light sheet metal with a fitting lid, which was closed. It had a handle at each side. Its capacity was about nine gallons, but it was only a third or a half full. It was not in itself an inherently dangerous thing and could be carried quite safely and easily by two persons exercising ordinary care. A caterer called as a witness on behalf of the pursuers, who had large experience of the use of such urns, said that he had never had a mishap with an urn while it was being carried. The urn was in charge of two responsible persons, McDonald, the church officer, and the lad, Taylor, who carried it between them. When they entered the passage way they called out to the children there congregated to keep out of the way and the children drew back to let them pass. Taylor, who held the front handle, had safely passed the children, when, for some unexplained reason, McDonald loosened hold of the other handle, the urn tilted over, and some of its contents were spilt, scalding several of the children who were standing by. The urn was not upset, but came to the ground on its base.

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(1) [1943] A. C. 92, 104.

In my opinion, Mrs. Alexander had no reason to anticipate that such an event would happen as a consequence of granting permission for a tea urn to be carried through the passage way where the children were congregated, and, consequently, there was no duty incumbent on her to take precautions against the occurrence of such an event. I think that she was entitled to assume that the urn would be in charge of responsible persons (as it was) who would have regard for the safety of the children in the passage (as they did have regard), and that the urn would be carried with ordinary care, in which case its transit would occasion no danger to bystanders. The pursuers have left quite unexplained the actual cause of the accident. The immediate cause was not the carrying of the urn through the passage, but McDonald's losing grip of his handle. How he came to do so is entirely a matter of speculation. He may have stumbled or he may have suffered a temporary muscular failure. We do not know, and the pursuers have not chosen to enlighten us by calling McDonald as a witness. Yet it is argued that Mrs. Alexander ought to have foreseen the possibility, nay, the reasonable probability of an occurrence the nature of which is unascertained. Suppose that McDonald let go his handle through carelessness. Was Mrs. Alexander bound to foresee this as reasonably probable and to take precautions against the possible consequences? I do not think so. The only ground on which the view of the majority of the learned judges of the First Division can be justified is that Mrs. Alexander ought to have foreseen that some accidental injury might happen to the children in the passage if she allowed an urn containing hot tea to be carried through the passage, and ought, therefore, to have cleared out the children entirely during its transit, which Lord Moncrieff describes (1) as "the only effective step." With all respect, I think that this would impose on Mrs. Alexander a degree of care higher than the law exacts.

There is a passage in Mrs. Alexander's evidence on which reliance is placed by Lord Moncrieff (2) and Lord Carmont (3) as tantamount to an admission on her part of a failure of duty, but the answers which she gave with creditable candour to the leading questions of cross-examining counsel are, in my opinion, quite natural expressions on her part of wisdom after the distressing event. She says that, if she had been told of the arrival of the men with the urn, as she expected she would be, she "certainly would have got them [the children] away "from the entrance at the doorway." That is just what McDonald and Taylor evidently did. I do not think that Mrs. Alexander's evidence amounts to an admission of negligence on her part, and, in any case, it is not an admission binding on the defenders. No special point arises from the circumstance that the injured children were invitees on the defenders' premises. They were entitled to rely on not being exposed while on the premises to any risk occasioned by the negligence of the defenders or their servants. As, in my opinion, no negligence has been established, I agree with what I understand to be the view of all your Lordships that the appeal should be allowed and the judgment of the Lord Ordinary restored.

Lord Wright (read by Lord Clauson). My Lords, it is impossible not to feel a desire that the children, by or on behalf of whom these proceedings have been taken, should be compensated for the injuries sustained by them. It is true that the accident could not have occurred but for the action of Mrs. Alexander, the appellants' manageress, in giving permission that the tea urn should be carried through the short but narrow passage in which the children, about a dozen in number, were waiting as customers at the appellants' sweet counter to buy ices or sweets, but, to establish liability, the court has to be satisfied that the appellants owed a duty to the children, that that duty was broken, and that the children were injured in consequence of the breach.

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(1) 1942 S. C. 126, 135.
(2) Ibid. 134.
(3) Ibid. 139.

That the appellants owed a duty to the children is not open to question. Your Lordships are not, therefore, on this occasion exercised by the problem which was presented recently in *Bourhill* v. *Young* (1), which was whether the person injured came within the limits of foreseeable harm from the dangerous acts complained of. Here the children were on the appellants' premises in full view of Mrs. Alexander, the appellants' responsible servant, and were plainly liable to be injured if the place in which they were was rendered dangerous to them by Mrs. Alexander's act in consenting to the urn being carried through the place. The question thus is whether Mrs. Alexander knew or ought to have known that what she was permitting involved danger to the children. The same criterion applies in this connexion as applied in the kindred problem in *Bourhill's* case (1), that is to say, the criterion of reasonable foreseeability of danger to the children. It is not a question of what Mrs. Alexander actually foresaw, but what the hypothetical reasonable person in Mrs. Alexander's situation would have foreseen. The test is what she ought to have foreseen. I may quote again as in *Bourhill's* case (1) Lord Atkin's words in *Donoghue* v. *Stevenson* (2): "You must take "reasonable care to avoid acts or omissions which you can "reasonably foresee would be likely to injure your neighbour." On this occasion the children were "the neighbours." The act or omission to be avoided was creating a new danger in the premises by allowing the church party to transport the urn. If that issue is decided against the appellants, they must be held responsible in the action.

The issue can be stated on the general principles of the law of negligence without any reference to the special rules relating to the position of those who come as invitees upon premises.

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(1) [1943] A. C. 92.

(2) [1932] A. C. 562, 580.

The children were clearly invitees within the rules laid down in *Indermaur* v. *Dames* (1), because they were customers at the appellants' shop, but that authority does no more than lay down a special subhead of the general doctrine of negligence. Indeed, in *Heaven* v. *Pender* (2) Lord Esher M.R. would have decided the case simply on the general principles of negligence. He anticipated the language used in *Donoghue* v. *Stevenson* (3) when he enunciated the principle (4): "Whenever one "person is by circumstances placed in such a position with "regard to another that everyone of ordinary sense would at "once recognize that if he did not use ordinary care and skill "in his own conduct with regard to those circumstances he "would cause danger of injury to the person or property of "the other, a duty arises to use ordinary care and skill to "avoid such danger." This is a wider rule than that laid down in *Indermaur* v. *Dames* (1) and places the duty on a wider basis than is there postulated. The duty in *Indermaur's* case (1) is limited to occupiers, or persons in control, of "premises," a wider term which embraces places and structures of all sorts on which persons may be invited to come, and has reference to the safe condition of these premises from the standpoint of the invitees. Many cases have been decided on "invitation" and many sub-rules and distinctions have been evolved, as, for instance, in *Robert Addie & Sons (Collieries), Ld.* v. *Dumbreck* (5), with which may be contrasted *Excelsior Wire Rope Co., Ld.* v. *Callan* (6), which the House, ignoring problems of the rule of invitation (indeed, there was there no "invitation") decided on the short and simple ground stated by Lord Buckmaster (7): "It was therefore well known to "the appellants that when this machine was going to start "it was extremely likely that children would be there and, "with the wire in motion, would be exposed to grave danger." This decision was based on the same principle as that stated by Lord Esher and Lord Atkin in the passages I have quoted. The House did not consider whether the appellants there were occupiers or whether the children were invitees (that is persons who came on the premises on business of mutual concern to them and the appellants) or bare licensees or trespassers. It was enough that a danger to the children was created by the act of the appellants in that case and that they either knew or ought to have known of the danger. That simple principle is enough to decide the present appeal subject to the question of fact whether there was the creation of an obvious danger. The complications which have centred round the doctrine of invitation are absent in this case. I do not ignore or dispute that the simple principle, like other simple principles, may be subject to many qualifications which have limited, or, perhaps, sometimes obscured, its correct application, or that the principle may have come into real or apparent conflict with prevalent rules in other spheres of law. It may be possible to put the principle of negligence in a nutshell, but difficult to keep it there, but all this may, I think, be disregarded in deciding the present appeal.

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(1) (1866) L. R. 1 C. P. 274; (1867) L. R. 2 C. P. 311.

(2) (1883) 11 Q. B. D. 503.

(3) [1932] A. C. 562.

(4) 11 Q. B. D. 509.

(5) [1929] A. C. 358.

(6) [1930] A. C. 404.

(7) Ibid. 410.

Before dealing with the facts, I may observe that in cases of "invitation" the duty has most commonly reference to the structural condition of the premises, but it may clearly apply to the use which the occupier (or whoever has control so far as material) of the premises permits a third party to make of the premises. Thus, the occupier of a theatre may permit an independent company to give performances, or the person holding a fair may grant concessions to others to conduct side shows or subsidiary entertainments, which may, in fact, involve damage to persons attending the theatre or fair, and in such and similar cases the same test of reasonable foreseeability of danger may operate to impose liability on the person authorizing what is done. The immediate cause of damage in such cases is generally the action of third parties who are neither servants nor agents of the defendant, but are mere licensees or concessionaires for whose acts as such the defendants are not directly liable. If the occupiers are held liable for what is done, it is because they are in law responsible in proper cases at an earlier stage because of the permission which they gave for the use of their premises. This is the cause of action against them. Thus, in the present case the appellants are not primarily concerned with the manner in which the members of the church party carried the urn as they would have been if these members had been their servants or agents. The two men were mere licensees in the matter. The appellants were not directly responsible for their acts. If they are to be held responsible, it must be because, by the permission which Mrs. Alexander, their manageress, gave to the members of the church party, they created an unusual danger affecting the invitees, in particular, the children. The breach of duty (if any) may thus be stated to have been that in granting the permission they did not use reasonable foresight to guard the children from unusual danger arising from the condition or use of the premises. If the tea urn had been upset by the negligence of the appellants' servants, the appellants would have been liable in negligence. Whether or not they would have been liable as invitors in the alternative would depend on other considerations. The cause of action in invitation is different, because it depends primarily, not on what actually happened (except in the sense that what actually happened would be essential to complete the cause of action by showing damage), but on whether the invitor (it is convenient to use the word) knew or ought to have known that the invitee was being exposed to unusual danger. Where the unusual danger was due to structural defects the question can be stated to be whether the invitor knew or ought to have known of the defects. In a case like the present the question is whether it can be said of Mrs. Alexander that she either knew or ought to have known that the children would be exposed to unusual danger by reason of the uses to which the premises were put by her permission for the tea urn to be carried into and down the passage. It is not, of course, a question of what she actually thought at the moment but what the hypothetical reasonable person would have foreseen. That is the standard to determine the scope of her duty. This involves the question: Was the operation of carrying the tea urn something which a reasonable person in Mrs. Alexander's position should have realized would render the place in which it was performed dangerous to the children in the circumstances? This is the crucial issue of fact and the acid test of liability. On this crucial issue I agree with the Lord President. He said (1): "I find myself unable to assent to the proposition "that anything was authorized by the defenders or their "servant in this case which obviously involved a danger which "could not be avoided by the care of the men who carried the "urn. The respondents [i.e., the defenders] were not bound to "take precautions against dangers which were not apparent to "persons of ordinary intelligence and prudence."

A distinction has been drawn in some cases between things intrinsically dangerous or dangerous per se and other things which are not dangerous in the absence of negligence. The correctness or value of that distinction has been doubted by eminent judges. I think, however, that there is a real and practical distinction between the two categories. Some things are obviously and necessarily dangerous unless the danger is removed by appropriate precautions. These are things dangerous per se. Other things are only dangerous if there is negligence. It is only in that contingency that they can cause danger. Thus, to introduce, not a tea urn, but a savage animal, such as a lion or a tiger, into the passage way would have been of the former class. Another illustration of the same class may be afforded by the performance in a circus on the flying trapeze. The occupier who permits such a performance owes a duty to the members of the audience to protect them by sufficient netting or otherwise against the obvious risk of the performer missing his hold. The present case, however, in my opinion, falls under the other category. It was not, in my opinion, per se dangerous. I do not think that the safe carriage of the tea urn presented any reasonably foreseeable difficulty. The urn was about sixteen inches high and about fifteen inches in diameter. It was a cylinder of metal about one eighth of an inch thick with a lid which was in position. It weighed at most about one hundred pounds with the quantity of tea it contained. The handles for carrying it were about eighteen inches apart. Two men should have had no difficulty in carrying it safely even if one had to go in front and one behind because of the narrow space, as the men actually did. There is no explanation of how the accident happened. At the moment when one side of the urn was dropped, McDonald was at the handle at the back which he dropped, Taylor being at the front. It might have been easier for the two men to carry the urn side by side, but, having regard to its size and the closeness of the two handles to each other, I cannot see any difficulty in carrying it as the two men were doing. McDonald was not called. It is left to pure conjecture how he came to lose hold of the handle. It may have been a momentary physical faintness or a sudden stumble. Perhaps some hot tea may have splashed on his hand, but that is not likely with the urn only about half full and the lid on even if not screwed down. There is no evidence and no probability that children pushed against him and caused him to lose his grip. Any defect in the floor is excluded. There seem to be only two possible alternatives, either a mere accident or negligence. In my opinion, neither hypothesis could impose liability on the appellants. As to negligence, the two men were not their servants. They were not responsible for their acts. That the men should be negligent in so simple an operation was not likely to happen. It was a mere possibility, not a reasonable probability. The men, if negligent, were, no doubt, responsible for their own negligence, but from the standpoint of the appellants the risk of negligence was a mere unlikely accident which no reasonable person in Mrs. Alexander's position could naturally be expected to foresee. The same is true of an accidental slip or loss of grip. To hold the appellants liable on either basis would be to make them insurers, which under the authorities they are not. In my opinion, no breach of duty or negligence by the appellants to the respondents has been established.

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(1) 1942 S. C. 126, 145.

Notwithstanding the number of cases dealing with invitation it is not easy to find authorities covering the exact circumstances of the present case, but *Cox* v. *Coulson* (1) is an illustration of a danger created by a licensee or concessionaire. The trouble arose, not from any structural defect in the premises, but from the use of the premises made by licensees under a permission or licence given by the defendants. The premises were a theatre and the plaintiff was a member of the audience who had bought a ticket. The position, therefore, depended on the express or implied terms of the contract. These might impose either a greater or a less burden on the contractor than the general law of invitation or of negligence imposes on the invitor. In *Cox* v. *Coulson* (1), the Court of Appeal treated the terms to be implied in the contract as in substance imposing a duty identical with that between invitor and invitee. The performers were an independent theatrical company not in the employment of the occupiers of the theatre. The Court of Appeal held that the relationship of the parties raised the same duty as that between invitor and invitee. Bankes L.J. said (2): "It seems to me obvious that the duty of the invitor "in a case like the present is not only confined to the state "of the premises, using that expression as extending to the "structure merely. The duty must to some extent extend to "to the performance given in the structure, because the "performance may be of such a kind as to render the structure "an unsafe place to be in whilst the performance is going on, "or it may be of such a kind as to render the structure unsafe "unless some obvious precaution is taken." As an instance

(1) [1916] 2 K. B. 177.
(2) Ibid. 191.

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of the latter, the lord justice instanced the case of a tight rope dancer. There the obvious precaution which must be taken is the provision of a net, in the absence of which the premises could not be said to be reasonably safe, but the court emphasized that the occupier does not warrant the security of the premises nor does he warrant that there shall be no negligence or want of skill on the part of the persons to whom he grants the licence or concession to use the premises in the particular manner.

In the present case, as I have stated, as the permitted operation was intrinsically innocuous, I do not think any obligation rested on Mrs. Alexander to attempt to supervise it. As a reasonable person, not having any ground for anticipating harm, she was entitled to go on with her proper work and leave the church party to do what was proper. There might, of course, be circumstances in which, because there was an obvious risk, a duty might rest on the occupier to supervise the actual conducting of the operation if the permission was given. I do not see what Mrs. Alexander could have done in that respect unless she had seen that all the children were removed from the passage when the urn was being carried through. That might be her obligation if the operation she permitted had been intrinsically dangerous, but it was not so in the circumstances as I apprehend them. No doubt, some difficult questions of fact may arise in these cases. In the present case, however, as I think that there was no reasonably foreseeable danger to the children from the use of the premises which the appellants permitted to be made, I think the respondents' claim cannot be supported. In my judgment the appeal should be allowed.

Lord Romer (read by Lord Thankerton). My Lords, the question to be decided on this appeal is whether the accident that befell the respondents on June 15, 1940, was due to a breach of a duty owed to them by the appellants. That there was such a duty is not and cannot be denied. For the respondents were present in the place where the accident occurred as the appellants' invitees. Nor can there be any serious doubt as to what the nature of that duty was. It was the duty to take through their agents and employees all proper precautions to ensure that the respondents, while on the premises of the appellants, should not be subjected to any unusual risk that would have been within the contemplation

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of any reasonable person. If any such risk had materialized and caused damage to the respondents or any of them, the appellants would undoubtedly have been liable. Had it, for instance, been proved that the accident was due to the jostling of McDonald by the children as the urn was being carried to the tea rooms along the passage where the children were, or to McDonald tripping over some irregularity in the floor of the passage of which Mrs. Alexander, the manageress of the tea rooms, knew or ought to have known, the appellants would properly have been held liable for the damage sustained by the respondents. The risk of these things happening should have been within the contemplation of Mrs. Alexander; but unfortunately for the respondents they failed to show how it came about that McDonald lost control over the urn. It being thus unknown what was the particular risk that materialized, it is impossible to decide whether it was or was not one that should have been within the reasonable contemplation of Mrs. Alexander or of some other agent or employee of the appellants, and it is, accordingly, also impossible to fix the appellants with liability for the damage that the respondents sustained. For, with all respect to Lord Carmont, I am unable to agree with the opinion that he expressed (1) to the effect that, if it were the duty of the appellants to see that the children were not in the passage way in order to prevent the children being subjected to a risk that should have been within the contemplation of the appellants, " there "would be no escape from liability even if it were proved "that the actual damage to the invitees happened through "the tea urn being spilt in a way that could not reasonably "have been anticipated." I cannot think, for instance, that, if the accident had been occasioned by a portion of the ceiling falling down on McDonald owing to a defect in it of which they neither knew nor ought to have known, the appellants could have been made liable; even if it had been their duty (and I see no reason to suppose that it was) to remove the children altogether from the passage to avoid the risk of Taylor and McDonald being jostled as they carried the urn along. In such a case the breach of this last-mentioned duty would not have been the cause of the accident to the respondents. It might have been a causa sine qua non. It certainly would not have been the causa causans. In my opinion, the appellants can only be fixed with liability if it

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(1) 1942 S. C. 126, 140.

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can be shown that there materialized a risk that ought to have been within the appellants' reasonable contemplation. As this has not been shown, the appeal should, in my opinion, be allowed.

LORD CLAUSON. My Lords, the crucial question in this matter appears to me to be whether Mrs. Alexander ought as a reasonable woman to have had in contemplation that, unless some further precautions were taken, such an unfortunate occurrence as that which in fact took place might well be expected. For myself, I find it quite impossible to answer this question in the affirmative. I appreciate that to some minds it would appear proper to answer this question in the affirmative, but those to whom it so appears would, in my humble judgment, be applying a standard of foresight not to be expected, in the world as it stands, in the ordinary reasonable man. I, accordingly, find myself unable to do otherwise than concur with my noble friends, whose opinions have already been delivered, in advising your Lordships that this appeal ought to be allowed, and the judgment of the Lord Ordinary ought to be restored.

Appeal allowed.

Solicitors for appellants: *Martin & Co., for Simpson & Marwick, W.S., Edinburgh.*

Solicitors for respondents: *H. S. L. Polak & Co., for Herbert Macpherson, Edinburgh, and John J. Carty, Glasgow.*

F. H. C.

Followed. *Re* Dowie's Will Trusts. [1949] 1 Ch. 547

Dictum of Lord Romer, at p. 485, *applied.* *Re* Dowie's Will Trusts. [1949] 1 All E.R. 968.

[HOUSE OF LORDS.]

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1943

AND

Feb. 9, 11, 12; *Apr.* 16.

MUIR AND OTHERS . . . . RESPONDENTS.

Scotland—Succession—Moveable or personal estate—Held in liferent by virtue of deed dated after July 31, 1868*—Liferenter "born after date "of deed"—Deed giving power to appoint liferenter—Exercise of power—Material date—Trusts* (*Scotland*) *Act,* 1921 (11 *&* 12 *Geo.* 5, *c.* 58), *s.* 9.

**Present:* Lord Thankerton, Lord Macmillan, Lord Wright, Lord Romer, and Lord Clauson.

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By s. 9 of the Trusts (Scotland) Act, 1921: "It shall be "competent to constitute or reserve by means of a trust or otherwise a liferent interest in moveable and personal estate in "Scotland in favour only of a person in life at the date of the "deed constituting or reserving such liferent, and, where any "moveable or personal estate in Scotland shall, by virtue of any "deed dated after July 31, 1868 (the date of any testamentary "or mortis causa deed being taken to be the date of the death of "the granter . . . .) be held in liferent by or for behoof of a person "of full age born after the date of such deed, such moveable or "personal estate shall belong absolutely to such person . . . ."

By virtue of a trust disposition and settlement, dated March 10, 1902, by J. M., who died in 1903, a fund was liferented by his son M. W. M. who, in exercise of a limited power of appointment conferred on him thereby, directed the trustees thereunder, by a trust disposition and settlement made in 1915, to hold that fund for his children in liferent and for their children and remoter issue per stirpes in fee. He died in 1922, leaving two children, born respectively in 1914 and 1916, who both attained full age:—

Held, that the liferents were "constituted" within the meaning of s. 9 of the Act by the trust disposition and settlement of 1902, which conferred the power, and that, accordingly, on attaining full age, the children of M. W. M. became entitled to the fee of the shares held for them.

Dicta in *Stewart's Trustees* v. *Whitelaw* 1926 S. C. 701, 718 and *Burns's Trustees* v. *M'Kenna* 1940 S. C. 489, 504 approved.

Decision of the Court of Session, 1942 S. C. 5, reversed.

APPEAL from the Second Division of the Court of Session.

The facts, stated by LORD THANKERTON, were as follows: The testator, Sir John Muir of Deanston, died on August 6, 1903, leaving a trust disposition and settlement, dated March 10, 1902, by which he assigned and disponed to the trustees therein designed his whole estate heritable and moveable, real and personal, but in trust always for the purposes thereinafter set forth. By the ninth purpose the testator provided for the division of the residue and remainder of his means and estate among his children in such proportions as to give to his son who should succeed to his baronetcy twice as much as to his other sons, and to his other sons twice as much as to his daughters. By the tenth purpose the testator provided as regarded the sons' shares of residue that one-half of their respective shares was to be paid over to the sons who had attained the age of twenty-five years at the time of his death and to the other sons on their attainment of that age with provision as to the failure of any son to survive the date of payment. The provisions as to this half of the sons' shares were not material. As to the other half of the sons' shares, the material provisions of the tenth purpose were as follows: "And I direct my trustees (subject to the right of my trustees "to exercise the powers hereinafter conferred on them) to set "apart hold and invest the other half of the shares of my sons "in their own names as trustees foresaid for behoof of my "sons respectively in liferent for their liferent alimentary use "only and for payment of the annual income or interest to "such sons and for behoof of the lawful children or remoter "issue of my sons in such shares and proportions and subject "to such conditions and limitations (including the restriction "of the share of any of his children or remoter issue to a "liferent) as my sons may respectively appoint and failing "such appointment equally among such children or remoter "issue and the survivors and survivor of them per stirpes "share and share alike in fee." The testator was survived by his wife, who died in 1929, and four sons and four daughters. The youngest son, Matthew William Muir, had attained the age of twenty-five years at the time of the testator's death. The trustees, accordingly, paid him one-half of his share of residue, and invested the other half and paid the income to him in satisfaction of his alimentary liferent until his death on February 9, 1922. Matthew William Muir was survived by two children, Mrs. Gillian Rachel Muir or Williams, who was born in 1914, and married in 1940, and Ian Kay Muir, who was born in 1916, and was killed in action in 1940, unmarried. Mrs. Williams was the appellant in this appeal as an individual and as executrix of her brother. Matthew William Muir left a trust disposition and settlement dated February 5, 1915, in which he exercised the power of appointment conferred on him by the testator, his father, as follows: "Moreover in exercise of the powers conferred on me by the "trust disposition and settlement of my father the said Sir John "Muir . . . . I do hereby direct and appoint the trustees at "the time acting thereunder upon my death to hold, apply, "pay and convey the one-half liferented by me of my share in "my father's estate among my children jointly with the issue "per stirpes of any of them who may die leaving issue in such "proportions that the share of a son or his issue shall be double "that of a daughter or her issue: and I provide and declare "that the shares of my children, sons and daughters alike, shall "be held for them in alimentary liferent only and for their "children and remoter issue per stirpes in fee on the same "terms and conditions in every respect so far as applicable as "are hereinbefore provided by me with reference to my "daughters' shares of my own estate . . . ." This incorporation of the terms and conditions in reference to his daughters' shares of his own estate appeared to be an ineffective attempt to delegate his own power of appointment, and might be disregarded. The appellant having attained full age in 1935, and Ian Kay Muir having attained that age in 1937, a question arose whether by virtue of s. 9 of the Trusts (Scotland) Act, 1921, the share of the residuary estate of the testator held for their behoof respectively in liferent belonged absolutely to them respectively, thereby entitling the appellant, in her own right and as executrix of her brother, to have the share, which consisted of moveable estate, made over to her by the testator's trustees. A special case was adjusted by the parties interested and was heard by the Second Division of the Court of Session, which on October 29, 1941, pronounced an interlocutor. The trustees of the testator were the first parties to the case. The appellant, as an individual, was the second party, and, as executrix of Ian Kay Muir, was the third party. The fourth parties were the whole persons who, apart from the second and third parties' claim, were then interested in the fee of the estate claimed under the Act of 1921. The questions of law were "(1.) Are the second and third parties now entitled "to the fee of the shares held for the second party and the "said Ian Kay Muir? (2.) In the event of question one being "answered in the affirmative, are the first parties now bound "(*a*) to deliver . . . . to the second party, the share appointed "to be held for her in liferent? (*b*) to deliver . . . . to the "third party the share appointed to be held for Ian Kay Muir "in liferent?" The Second Division negatived the claim of the second and third parties to the fee of the share held for behoof of the appellant and her brother in liferent. The appellant appealed to the House of Lords.

Clyde K.C. and *Williamson* (both of the Scottish Bar) for the appellant. The liferents in favour of the appellant and her brother were "constituted" within the meaning of s. 9 of the Trusts (Scotland) Act, 1921, by the trust disposition and settlement of the donor of the power, and, accordingly, on the true construction of that section, they were entitled on attaining full age to the fee of the sums held in liferent. In Scotland there is no common law rule against perpetuities, but there are certain statutory provisions to prevent a series of liferents. These are the Entail Amendment (Scotland) Act, 1848, ss. 47 and 48; the Entail Amendment (Scotland) Act, 1868, s. 17; and s. 9 of the Act of 1921. The two later Acts were designed to do for moveable property what the first Act did for heritable property. The Act of 1848 was certainly wide enough to cover the case of a power of appointment: see s. 48. On the construction of s. 9 of the Act of 1921, the shares of the appellant and her brother are held by virtue of the deed of 1902, and the subsequent deed merely gives a direction. In the case of a special power of appointment, the exercise of the power must be read into the deed by which it was created and which laid down its terms: see Farwell on Powers, 3rd ed., p. 323; M'Laren on Wills and Succession, 3rd ed., p. 1104; Sugden on Powers, 8th ed., pp. 396, 470. On any construction of the section the funds are held, at any rate, by virtue of both deeds, for without the deed of 1902 the appellant and her brother could not have been given the liferents and that is sufficient for the contention of the appellant. It would not be proper so to construe s. 9 as to enable a man to do by delegation what he could not do himself, and, admittedly, the testator could not have constituted a liferent in favour of his unborn grandchildren. His deed was the body and the power was only the hand, which cannot be authorized to do what the body itself cannot do. The donee of a power cannot do that which the donor himself could not have done: see *Duke of Marlborough* v. *Lord Godolphin* (1), affirmed in the House of Lords sub nom. *Spencer* v. *Duke of Marlborough* (2). The language of s. 9 ("to constitute a "reserve by means of a trust or otherwise") is deliberately made wide enough to cover the case of constituting a liferent interest by conferring on another person the power to constitute it, and that is in accordance with the principle that the exercise of the power must be read into the principal deed. The view of the Second Division involves divorcing the exercise of the power from reality and treating it in isolation, regarding the exercise of the power as if it were the beginning and end of the whole matter, whereas it receives its life blood and is valid only in relation to the deed of 1902. The English authorities of *Duke of Marlborough* v. *Lord Godolphin* (3) and *In re Fane. Fane* v. *Fane* (4) are not decisive of the present problem,

(1) (1759) 1 Eden 404.

(2) (1763) 3 Bro. P. C. 232.

(3) (1750) 2 Ves. Sen. 61.

(4) [1913] 1 Ch. 404, 413.

though the way in which the English rule against perpetuities was applied gives support to the appellant's case. No Scottish decision directly bears on the question, but the trend of judicial opinion expressed in obiter dicta is in accordance with the appellant's contention: see *Gillon's Trustees* v. *Gillon* (1); *Whitelaw* v. *Stewart's Trustees* (2); *Stewart's Trustees* v. *Whitelaw* (3); *Burns's Trustees* v. *M'Kenna* (4). If the appeal failed, there would be opened up a whole vista of liferents.

Hill Watson K.C. (of the Scottish Bar), *Roxburgh K.C.* (of the English Bar) and *James Walker* (of the Scottish Bar) for the respondents. The liferents in favour of the appellant and her brother were constituted within the meaning of s. 9 of the Trusts (Scotland) Act, 1921, by the appointment contained in the deed of 1915 and not by the earlier deed. In *In re de la Bere's Marriage Settlement. De la Bere* v. *Public Trustee* (5), Simonds J. referred to *In re Dickinson's Settlements. Bickersteth* v. *Dickinson* (6) and *In re Rush. Warre* v. *Rush* (7) and said that "those cases are examples of a principle which seems to "be perfectly clear, namely, that, where there is an instrument "creating a power and a later instrument exercising that power, "the interest created by the exercise of the power arises under "the later instrument, for, in fact, there never was such an "interest until the power was exercised so as to create it." Till the deed of 1915 no one knew whether any liferent would come into being at all. It was in the uncontrolled discretion of the donee of the power whether any liferent ever came into existence. It was to the deed exercising the power that the trustees had to look for the measure of their obligations and the beneficiaries for the measure of their rights. The first deed constituted an interest in fee in the appellant, failing any appointment by Matthew William Muir, but when he executed his deed that interest ceased and he thereby constituted a new one. The common law of Scotland has no rule against perpetuities, but it regarded perpetuities and trusts with favour: *Strathmore* v. *Strathmore's Trustees* (8); *Suttie* v. *Suttie's Trustees* (9). Accordingly, this section should be strictly construed, and in case of doubt it should be

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(1) (1890) 17 R. 435.
(2) (1926) Unrep.
(3) 1926 S. C. 701, 718, 719.
(4) 1940 S. C. 489, 499, 503, 504.
(5) [1941] Ch. 443, 447, 448.
(6) [1939] Ch. 27.
(7) [1922] 1 Ch. 302.
(8) (1831) 5 W. & S. 170, 193.
(9) (1846) 18 J. 442, 445.

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interpreted so as to give the testator freedom to do what he wishes: see *Shiell's Trustees* v. *Shiell* (1); *Reid's Trustees* v. *Dashwood* (2). The effect of this would not be to open up an indefinite series of liferents, since a liferent could only be constituted in the case of a person born within the lifetime of the donee of the power. In *Stewart's Trustees* v. *Whitelaw* (3) and *Burns's Trustees* v. *M'Kenna* (4) the judges, in the opinions they expressed, were unduly influenced by English decisions turning in the main on the English rule against perpetuities which is not part of the law of Scotland. From one point of view the exercise of the power was derived from both deeds, but on that ground, too, the respondents are entitled to succeed, since the liferent was constituted by the deed of 1915, taken with the other deed, and the rights of the appellant were defined by it.

The House took time for consideration.

Apr. 16. Lord Thankerton. The law against perpetuities in Scotland is entirely of statutory origin, the earliest provision being contained in the Entail Amendment Act, 1848, ss. 47 and 48, which related only to heritage. Provision relating to moveable and personal estate on lines analogous to s. 48 of that Act was made by s. 17 of the Entail Amendment (Scotland) Act, 1868. This section was repealed by, and re-enacted as s. 9 of, the Trusts (Scotland) Act, 1921. This section was amended so as to apply to deeds dated before July 31, 1868, by s. 45 of the Conveyancing (Scotland) Act, 1924, on the conditions therein expressed, but the Act of 1924 is not material in the present case.

The construction of s. 9 of the Act of 1921 has been the unfortunate victim of judicial obiter dicta, and, before the present case, it had been the subject of judicial decision in only one case, a decision by Lord Pitman in 1932, in which, as Lord Ordinary, he treated the question as an open one, despite the obiter dictum of Lord Sands in the Inner House in an earlier stage of the same case. In the present case, Lord Wark has felt bound to make a palinode of his obiter dictum in a previous case in 1940. It appears to me, with all respect to Lord Jamieson, that, so far from throwing the administration of many estates into confusion by the

(1) (1906) 8 F. 848.
(2) 1929 S. C. 748.
(3) 1926 S. C. 701, 718.
(4) 1940 S. C. 489, 503, 504.

construction rejected by him, the decision in the present case is likely to rescue such administrators from the uncertainty into which these obiter dicta probably have thrown them, and, if they were trying to weigh the balance of authority on the alternative views of construction, they would be just as likely, if not more likely, to follow the construction rejected by Lord Jamieson. One other preliminary observation. The Lord Justice-Clerk suggests (1) that the case of a deed in exercise of a limited power of appointment might be a casus omissus, and asks if the court is "bound to assume that this "was an inadvertent omission and to supplement it by "implication in order to effectuate more completely the "presumed object which the legislature had in view?" This suggestion was not maintained at the hearing of this appeal, and, for myself, I have no doubt that limited powers of appointment were intended to be covered by the section, and that the only substantial question in the present appeal is whether the appellant is right in her contention that she and her brother, having been born after the death of the testator —though not after their father's death—were "born after the "date of such deed" within the meaning of the section.

My Lords, I cannot think that the section is very happily drafted. It contains two parts, the first of which appears to be declaratory of a prohibition by means of a declaration of what is alone competent. It might have been expressed as a direct prohibition, and, according to the usual canons of construction, it would be tantamount to a direct prohibition, but when you come to the second part, which is operative in character, it does not become operative until there is a postnatus of full age. In the present case it is unnecessary to consider the exact legal position in view of the first part of the section before there is a postnatus of full age. I reserve for future consideration the obiter dicta of Lord President Clyde in relation to the Act of 1848 in *Crichton-Stuart's Tutrix* (2). I will only add that I am unable to agree with Lord Wark that the Entail Act recognizes the competency of creating a liferent right in favour of a person not in life at the date of the deed constituting the liferent. It appears to me to have done its best to say exactly the opposite.

I regret, that, at any time, it has been thought necessary or helpful to refer to English decisions for the purpose of construing the statutes of 1848, 1868 and 1921, which relate

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(1) 1942 S. C. 5, 13.

(2) 1921 S. C. 840, 843.

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to Scotland only. I propose to decide this appeal on the Scottish law. We are here dealing with a limited power of appointment. It confers power on the donee to do three things—to select the beneficiaries among a specified class, to apportion the fund among the persons so selected, and to qualify, by restriction or limitation, the nature of the interest to be taken by these persons. These three powers are exercised by the donee as the delegate of the testator. It must be noted that, in Scotland, and as used here, the word "limitation" has no technical meaning as it would have in England, and, in truth, it adds nothing to the word "restriction" which precedes it. It is to be noted that the phrase actually used by the testator is "restriction to a liferent," not "limitation "to a liferent." The donee, in exercising the power, grants nothing. He only qualifies by restriction the grant which is made by the testator. In my opinion, Lord McLaren intended to state the law of Scotland when he said that the estate of the appointee is held to flow from the maker of the power: Wills and Succession, vol. ii., s. 2048. This is confirmed by the opinion of Lord Moncrieff in *Marshall's Trustees* v. *Findlay* (1). In this respect I see no ground for distinguishing between an appointment to heritage and an appointment to moveable estate, and the words of Lord Justice-Clerk Boyle in relation to a power of nomination of heirs appear to me to be equally applicable, in principle, to the present case. In *Stewart* v. *Porterfield* (2), the learned judge says: "In the case, again, "of heirs nomidandis [sic] in a substitution, a claimant "of the estate under such destination must show the instrument "by which he is nominated. That, however, is not the title "to the estate, but the evidence of his connexion with the "feudal grant of the estate." That principle clearly applies in regard to the power of selection and the power of apportionment in the present case, and I fail to see any reason why it should not apply to the power of restriction of the interest taken. I agree with Lord Pitman when he says, in the unreported stage of *Whitelaw* v. *Stewart's Trustees*: "Mrs. "Whitelaw did not, in my opinion, create or constitute the "liferent within the meaning of s. 9 of the Trusts Act. All "that she did was to qualify her father's gift to her son, to "attempt to limit it. She was not entitled to give her son a "liferent because she had nothing to give. What she did was "to limit her son's right to a liferent. That limitation is one

(1) 1928 S. L. T. 560, 561.
(2) (1826) 2 W. & S. 369, 377.

"which she could only make as representing her father, and "could have no more effect than a specific limitation made "by him. The deed by virtue of which it was made was "his deed."

In my opinion, the learned judges have confined their attention too closely to the use of the word "constitute," which occurs only in the first part of s. 9. The words "shall, "by virtue of any deed . . . . be held in liferent by or for "behoof of a person" are at least as important. For the reasons already explained, I am clearly of opinion that the fund here in question is held by the first parties, the testator's trustees, for behoof of the liferenters, by virtue of the testator's trust disposition and settlement, the exercise of the power of appointment being a mere direction to the trustees on the testator's behalf, as authorized by the testator, as to the beneficiaries selected from the class prescribed, the apportionment of the amounts and the restriction of the interest to be taken in the estate of the testator. I am, therefore, of opinion that the liferent was constituted by, and by virtue of, the testator's trust disposition and settlement.

For the reasons more fully explained in the opinion of my noble and learned friend Lord Romer, the learned judges of the Second Division have attributed to *Duke of Marlborough* v. *Lord Godolphin* (1), a relevance to the present question that it does not possess, for it dealt only with the time of vesting. In my opinion, Lord Sands's obiter dictum in *Stewart's Trustees* v. *Whitelaw* (2) was wrong in its prima facie view as to the Scottish law and right as to the English law, and the doubts of the Lord Justice-Clerk in the present case, based on the *Marlborough* case (1) are not justified. Subject to my view that there was a right in esse that was restricted by the exercise of the power, I am in substantial agreement with the obiter dictum of Lord Justice-Clerk Aitchison in *Burns's Trustees* v. *M'Kenna* (3), and I regret that, in the present case, through a misunderstanding of the *Marlborough* case (1), Lord Wark has retracted (4) his obiter dictum in *Burns's Trustees* v. *M'Kenna* (5). While it might well be regarded as an aid to the construction of the section, it is at least satisfactory that the construction which I have adopted does not permit the granter of the power to authorize the donee

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(1) 2 Ves. Sen. 61.

(2) 1926 S. C. 701, 718.

(3) 1940 S. C. 489, 499.

(4) 1942 S. C. 4, 16.

(5) 1940 S. C. 489, 503, 504.

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of the power to do on his behalf the very thing that the granter himself is not permitted by the statute to do. Accordingly, I am of opinion that the appeal should succeed, the interlocutor of the Second Division of the Court of Session should be recalled, and that the appellant is entitled to have the first question of law in the special case, as amended, answered in the affirmative. It follows that the second question of law should also be answered in the affirmative.

Lord Macmillan. My Lords, I find myself so entirely in agreement with the views which have just been expressed by my noble and learned friend, Lord Thankerton, that I shall content myself with referring briefly to the considerations which, to my mind, are decisive of the matter at issue.

In the first place, I do not think that the liferent interests of Mrs. Williams and her late brother were " constituted " by the trust disposition and settlement of their father, Matthew William Muir, within the meaning of s. 9 of the Trusts (Scotland) Act, 1921. They are beneficiaries, not of their father, but of their grandfather, the testator, Sir John Muir. What the testator did by his trust disposition and settlement was, in effect, to confer on his grandchildren an interest in a share of his estate, leaving it to his son to say, if he chose, that this interest should be restricted to a liferent. If the son did not choose to do so, the bequest was to be in fee. When the son by his will exercised the power, he did not bestow anything on his children. He merely restricted to a liferent the interest which the testator had bestowed on them. It would, I think, be a misuse of language to describe the son's will as a deed constituting his children's liferents. The liferents were, in my opinion, constituted by the testator's will. It was the testator's will which empowered their creation. That this is the sound interpretation is confirmed by the second and operative part of s. 9. Here the statute requires us to look for the deed "by virtue of" which the moveable or personal estate in question is " held in liferent " for behoof of the grandchildren. The estate in question is not held by Matthew William Muir's trustees in virtue of his will for behoof of his children in liferent. It is held, and can only be held, for their behoof in liferent by the testator's trustees in virtue of the testator's will.

I would further add that I agree with Lord Wark's first thoughts rather than with his second thoughts. I think that he stated a sound principle of construction when he said that "where a testator gives a power of appointment under which "the donee of the power may appoint among a limited class "to a liferent of part of the testator's estate, the validity of "the appointment must be judged as if the exercise of the "power were read into the will of the granter of the power.": *Burns's Trustees* v. *M'Kenna* (1). Finally, if it is not competent to constitute directly a liferent in favour of a post natus, it is not competent to do so indirectly by delegation. Such a liferent cannot competently be constituted "by means of a "trust *or otherwise*." What is not competent per directum is not competent per obliquum. Where, notwithstanding the statute, a testator purports to confer a liferent on a post natus, the sanction which the statute applies is to convert the liferent into a fee. It declares emphatically that the fund held in liferent for a post natus of full age "shall belong absolutely" to him. He has no option in the matter. I concur in the motion proposed by Lord Thankerton.

Lord Wright (read by Lord Thankerton). My Lords, I have had the opportunity of reading in print the speeches which have just been delivered by my noble and learned friends, Lord Thankerton and Lord Macmillan. I have also had the opportunity of reading in print the speech, about to be delivered, of my noble and learned friend, Lord Romer. I agree with these speeches, which deal so fully with the facts, the documents and the law in this case that I merely add the briefest summary of my own views to justify my dissent, with all respect, from the elaborate and learned judgments delivered by the lords of the Court of Session who heard the case.

The problem can be stated in very simple terms to be whether the funds in question were held in liferent in virtue of the settlement made by the testator, Sir John Muir, or in virtue of the appointment made by his son, Matthew William Muir, under the power conferred on him by Sir John's deed. As the appellant and her late brother, for whom she is executrix, were born after the date of the former deed, but not after the date of the latter, the fee only vests under s. 9 of the Trusts (Scotland) Act, 1921, in place of the liferent when these beneficiaries become of full age if the former is the material deed. The question can be stated simply, but it is clear from the great divergence of judicial opinion that the proper answer is matter of some difficulty. I shall proceed on the bare words of the second part of s. 9, as the Lords of the Inner House rightly think is the proper course. It seems to me that, on the plain sense of these words, the funds in question which are held by Sir John's trustees, whose duty it is to carry out the dispositions of his deed and who can only act under the authorization, direct or delegated, of that deed, are held by them within the meaning of s. 9 in virtue of that deed in liferent for the beneficiaries. When Matthew William Muir exercised the power of appointment he did not make any gift. He merely restricted the fee, which, but for the exercise of the power of appointment, would have passed to his son and daughter under the terms of the deed. The liferent held by the trustees, that is Sir John's trustees, thus passed to his grandson and grand-daughter under Sir John's deed which had by its express terms enabled the restriction of the fee and its limitation to a liferent if the power given under it was exercised by Matthew William Muir. I agree with the unreported judgment of Lord Pitman in *Whitelaw* v. *Stewart's Trustees*, where that learned judge points out that, in a case resembling the present in material particulars, the daughter who exercised the power of appointment given her by the will so as to restrict her son's share and reduce it from the fee to a liferent, did nothing more than limit her son's right which otherwise would have been the fee and that reduction or limitation she could only make as representing her father. "The deed," he said, "by virtue of which it was made was "his deed." I venture to accept and apply these words to the present case.

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(1) 1940 S. C. 489, 504.

I am of opinion that the funds were held in liferent in virtue of the testator's deed so that the operation of s. 9 automatically converted the liferent into the fee when the beneficiaries became of full age as in this case they severally did. Of course, this principle only applies where the power of appointment is a special or limited power. A general power obviously would be a different matter. This, I think, is sufficient to decide the appeal, apart from the further reasons stated by my noble and learned friends, with which I am in complete agreement and to which I cannot usefully add anything. In particular, I agree with Lord Romer's exposition of *Duke of Marlborough* v. *Lord Godolphin* (1) and his statement of the

(1) 2 Ves. Sen. 61.

English law in so far as it is material to this case. I concur in the motion proposed.

LORD ROMER (read by Lord Clauson). My Lords, if the question arising on the present appeal had to be decided in accordance with English law it is plain that the validity and effect of the liferents appointed by Matthew William Muir to his daughter, Mrs. Williams, and his son, Ian Kay Muir, would fall to be determined as though they had been given by the trust disposition and settlement of the testator, Sir John Muir. In other words, the appeal would have to be allowed, for it is a well-settled principle of English law in its relation to special, as distinguished from general, powers of appointment that "when the power is exercised the limitations created under it "are to be written into the instrument which created the "power": see per Buckley L.J. in *In re Fane. Fane* v. *Fane* (1). It necessarily follows from this principle that the donee of such a power cannot create any estate or interest that the donor of the power could not himself have created. "It is well-established," said an eminent author, "that under "a particular power, as a power to appoint to children, no "estate can be created which would not have been valid if "limited in the deed creating the power. The test of the "validity of the estates raised is to place them in the deed "creating the power in lieu of the power itself." : Sugden on Powers, 8th ed., p. 396. Whether this principle also forms part of the law of Scotland seems to me to be the question to be determined upon this appeal.

My Lords, until the decision of the Second Division of the Court of Session was given in the present case, such of the Scottish judges as had expressed any opinion on this question had answered it in the affirmative. Obiter dicta in favour of the principle had been expressed by Lord Sands in *Stewart's Trustees* v. *Whitelaw* (2), and by Lord Aitchison and Lord Wark in *Burns's Trustees* v. *M'Kenna* (3), while there had been an actual decision of Lord Pitman to the same effect in an unreported case of *Whitelaw* v. *Stewart's Trustees* (4). Their Lordships of the Second Division, however, disagreed with the views that had been so expressed, and did so, as I read their judgments, on two grounds. In the first place, they regarded the principle to which I have referred as being due to the dislike with which the law of England regarded perpetuities, whereas, said the Lord Justice-Clerk (1), and I doubt not quite accurately, the attitude towards them of the common law of Scotland "is one of indifference, and even of benevolence." He was not, therefore, prepared (2) to incorporate "doctrines "originating in the 'rule against perpetuities' into the law "of Scotland." Lord Wark and Lord Jamieson also seemed to attribute the principle to the sinister influence of the English rule against perpetuities. In the case of Lord Wark, who in the present matter has resiled from the opinion that he had expressed in favour of the principle in *Burns's Trustees* v. *M'Kenna* (3), this was somewhat remarkable seeing that in that case he had said: "The English rule, however, appears "to me to be based not upon any special or technical application "of a doctrine peculiar to English law, but upon general "grounds which are equally applicable in considering the "interpretation of the language of the Scottish statute." In saying this Lord Wark, in my opinion, had been unquestionably right. It is true that the principle has an important bearing in connexion with the rule against perpetuities, but so it has in connexion with the rule in *Shelley's Case* (4). In his work on "Contingent Remainders," 10th ed., p. 73, Fearne considers the following case. Freeholds have been limited to A for life with remainder to such uses (in favour, no doubt, of a particular class) as B shall appoint. In A's lifetime B appoints to the use of the right heirs of A. Do the limitations unite, says Fearne, or does the latter operate by way of contingent remainder to the heir, it being remembered that the rule in *Shelley's Case* (4) only operated where the limitation to A for life and the limitation to his heirs were found in the same instrument. Fearne, in expressing his concurrence in the former view, says this: "It is a conclusion afforded us, by a "doctrine which, I apprehend, has long since transcended the "limits of controversy, namely: that the limitation of a use, "under an execution of a power of appointment contained in "a conveyance to uses, in general, operates as a use created "by, and arising under, that conveyance itself." It would, therefore, be just as reasonable to attribute the origin of the principle in question to the rule in *Shelley's Case* (4) as to the rule against perpetuities. The truth is, however, that the principle owes its origin to neither rule. The principle would

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(1) [1913] 1 Ch. 404, 413.

(2) 1926 S. C. 701, 718.

(3) 1940 S. C. 489, 499, 503.

(4) (1932) Unrep.

(1) 1942 S. C. 5, 11.
(2) Ibid. 5, 15.
(3) 1940 S. C. 489, 503, 504.
(4) (1581) 1 Co. Rep. 93 b.

have existed even if the rule in *Shelley's Case* (1) had never been formulated and had the law of England entertained the same affection for a perpetuity as does the common law of Scotland. For the principle owes its origin simply and solely to the essential qualities of special, as distinguished from general, powers of appointment, and does no more than recognize and give effect to those qualities. This being so, the principle in question must be just as much a part of the law of Scotland as it is of the law of England, for I have no reason for thinking that there is any difference between the views entertained by the two systems of law respectively as to the nature of general and special powers of appointment.

My Lords, if a person be given a general power of appointment over certain property he is virtually the owner of that property. If and when he exercises the power the interests of his appointees come to them by virtue of and are created by the deed of appointment. In the case of a special power it is very different. If, for example, property be settled on trust for A for life and after his death on trust for such of A's children or remoter issue and in such proportions as B shall by deed appoint, B has no interest in the property whatsoever. He has merely been given the power of saying on behalf of the settlor which of the issue of A shall take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B fills up for him if and when the power of appointment is exercised. The appointees' interests come to them under the settlement alone and by virtue of that document. These remarks apply equally well to the case where the donee of the power of appointment has, not only the power of saying which of the class shall take under the trust, but also the power of saying what interests they shall take. This would be the case if, in the instance that I have given, the limitation after A's life interest were for such of the children or remoter issue of A in such proportions and for such estates and interests as B shall by deed appoint. If and when B executes the power the settlement will, in accordance with the principle, be read thereafter as if the property had been thereby limited to the appointees for the several estates and interests specified in the deed of appointment. If, when so read, any of the limitations offend the rule against perpetuities such limitations will fail, but this will not be because the principle forms any part of

(1) 1 Co. Rep. 93 b.

the rule against perpetuities. It will be because of the effect of that rule on the application of the principle in the particular case.

My Lords, I must now deal with the second ground upon which their Lordships of the Second Division based their decision. When dealing with the dictum of Lord Sands that is to be found in *Stewart's Trustees* v. *Whitelaw* (1), a dictum that was largely based on Buckley L.J.'s statement of the principle in *In re Fane. Fane* v. *Fane* (2) to which I have already referred, the Lord Justice-Clerk said this (3): "It is very material to "note with regard to the proposition which Lord Sands "derives from *Fane* v. *Fane* (2) that it appears to be contra-"dicted, or at any rate qualified, by another rule laid down by "Farwell [on Powers] at p. 313, namely, that, 'although the "'appointment is to be read into the instrument creating the "'power as part of that instrument, it is not to be so read in "'as to relate back in point of time to the creation of the "'power (*Duke of Marlborough* v. *Lord Godolphin* (4)),' and "again at p. 331 where it is laid down that 'the appointee's "'estate, though derived from the power, vests not at the "'time of the creation of the power, but at the time when its "'execution takes effect'". Lord Jamieson said much to the same purpose. Lord Wark said (5) that on further reflection he had come to the conclusion that the views that he had expressed in *Burns's Trustees* v. *M'Kenna* (6) "were not well "founded in law. The leading English case of *Marlborough* v. "*Godolphin* (7)," he observed, "was not brought to our notice in "*Burns's Trustees* (8)." My Lords, the case of *In re Fane. Fane* v. *Fane* (9) is not the only one in which the principle now in question has been formulated. It has been formulated, though, of course, not always in exactly the same language, in a host of other authorities and in every text book that deals with the subject. Even in the days of Fearne it had "long since transcended the limits of controversy." It would be strange, indeed, if it were now found that the decision of Lord Hardwicke in *Duke of Marlborough* v. *Lord Godolphin* (7) had contradicted or qualified the principle on which the courts of England have acted for so long. But, in truth, it does nothing of the sort. With all possible respect to the learned judges of the Second Division, Lord Hardwicke's decision has no bearing on the question that is now before the House. The decision was really no more than the logical application of the principle to the facts of that case. No statement of the principle that I have ever seen has suggested that the appointees under an appointment in their favour take any interest in the subject-matter of the power until the appointment takes effect. It is, on the contrary, quite plain that they do not, and that is all that Lord Hardwicke decided in the case in question. The facts of the case were these. A sum of money had been settled by a testator on trust for his wife for life with remainder to their children as she should by deed or will appoint. She exercised the power by her will and thereby appointed two sums forming part of the money to a son and a daughter who had survived the testator but had predeceased her. On her death their legal personal representatives claimed the two sums. Lord Hardwicke pointed out (1) that, although an appointee under a special power takes under the deed that creates the power, he does not take from the time of the creation of the power. Until the power is executed he takes nothing. In other words, the blank in the instrument creating the power has not until then been filled up. But, where a power is executed by a will, the interests appointed only vest on the death of the donee of the power and can only vest in appointees who are then living, for the donee cannot appoint to persons who are dead when the appointment takes effect and an appointment by will does not take effect until the death of the donee. Had the son and daughter survived their mother, their interests would have vested as at her death, but the interests would, nevertheless, have been created, not by the will of the wife, but by the will of the husband and would have come to the son and daughter by virtue of the latter document.

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(1) 1926 S. C. 701, 718.
(2) [1913] 1 Ch. 404, 413.
(3) 1942 S. C. 4, 12.
(4) 2 Ves. Sen. 61, 78.
(5) 1942 S. C. 4, 16.
(6) 1940 S. C. 489, 503, 504.
(7) 2 Ves. Sen. 61.
(8) 1940 S. C. 489.
(9) [1913] 1 Ch. 404.

My Lords, that the interests appointed in pursuance of a special power only arise in point of time when the appointment takes effect was also one of the questions decided by Russell J., as he then was, in *In re Rush* (2). The particular question was this. Under the Treaty of Peace Order, 1919, all property, rights and interests within His Majesty's dominions belonging to German nationals at the date when it came into force were subjected to the charge mentioned in the treaty. Now at

(1) 2 Ves. Sen. 61, 77.

(2) [1922] 1 Ch. 302.

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that date certain German nationals were entitled to reversionary interests in a settled fund and these interests were unquestionably subject to the charge. The interests were, however, liable to be defeated by the exercise of a special power of appointment of which the German nationals were among the objects. After the said date the donee of the power exercised it in favour of the German nationals in question. It was held that the interests that had been so appointed to them were not interests to which they were entitled at the date when the Treaty came into force. But no one could have successfully contended that the interests appointed to them were not created by the instrument from which the power was derived or that they did not take such interests by virtue of that instrument. For these reasons I am of opinion that this appeal should be allowed, and I agree with the motion that is before the House.

LORD CLAUSON. My Lords, I have had the advantage of reading in print and considering the opinion just delivered of my noble and learned friend, Lord Romer. I find myself in entire agreement with that opinion, and I, accordingly, confine myself to expressing my concurrence in the motion that is before the House.

Appeal allowed.

Solicitors for appellant: *Hunters, for Russell & Dunlop, W.S., Edinburgh.*

Solicitors for respondents: *Allen & Overy, for J. & R. A. Robertson, W.S., Edinburgh.*

F. H. C.

[HOUSE OF LORDS.]

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Mar. 15, 16, 18, 19, 22, 23; *Apr.* 19.

PENANG AND GENERAL INVESTMENT TRUST, LIMITED AND ANOTHER . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

Revenue—Income tax—Sur-tax—Undistributed income of company—Income of company deemed to be income of members—Apportionment

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**Present*: VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD MACMILLAN and LORD ROMER.

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Penang and General Investment Trust, Ld. v. Inland Revenue Commissioners.

of income—Apportionment to trustees—Powers of Special Commissioners—"Income arising under settlement"—Finance Act, 1922 (12 *&* 13 *Geo.* 5, *c.* 17) *s.* 21, *sub-s.* 1.

By s. 21 of the Finance Act, 1922, as amended by s. 31, sub-s. 1, of the Finance Act, 1927: "With a view to preventing the "avoidance of super-tax through the withholding from distribution "of income of a company which would otherwise be distributed, "it is hereby enacted as follows:—(1.) Where it appears to the "Special Commissioners that any company to which this section "applies has not . . . . distributed to its members in such manner "as to render the amount distributed liable to be included in the "statements to be made by the members of the company of their "total income for the purposes of super-tax, a reasonable part of "its actual income . . . . the commissioners may . . . . direct "that for purposes of assessment of super-tax the said income of "the company shall, for the year or other period specified in the "notice, be deemed to be the income of the members and the "amount thereof shall be apportioned among the members and "super-tax shall be assessed and charged under the provisions of "this section in respect of the sum so apportioned . . . ."

Where shares in a company are registered in the names of trustees, a direction and an apportionment under s. 21, sub-s. 1, of the Act can rightly be made to them and may be followed up by an assessment on the beneficiary.

Semble, if the Special Commissioners already know that the shareholders on the register are bare trustees, it is legitimate for them to apportion a proper fraction to the beneficiary in the first instance.

Decision of the Court of Appeal, [1942] 1 K. B. 420, affirmed.

Appeal from the Court of Appeal.

The appellant company was one to which s. 21 of the Finance Act, 1922, applied and was an "investment company" as defined by s. 20, sub-s. 1, of the Finance Act, 1936. It was incorporated on June 10, 1937, and its nominal and issued capital amounted to 856*l.* 11*s.*, divided as follows: 749 "A" ordinary shares of 1*l.* each; 100 "B" ordinary shares of 1*l.* each; 151 "C" voting shares of 1*s.* each. The "A" and "C" shares were not entitled to any dividend. The "C" shares were entitled to repayment of capital in a winding-up. The "B" shares were entitled to receive the whole of the dividends declared by the company and to a repayment of capital. The "A" shares were entitled to the balance of surplus assets in a winding-up. Both the "A" and "B" shares were registered in the name of trustees holding them under discretionary trusts established by settlements made by Sir John Ramsden, the second appellant. The actual income of the company for the year of assessment ending April 5, 1938, was 81,974*l.* 2*s.* 1*d.*, and it was mainly derived from dividends on shares in Penang Rubber Estates Co., Ld., but during that year it distributed no more than 2000*l.* by way of interim dividend, and, on August 30, 1938, after the conclusion of that year, 60,500*l.* as a final dividend. On August 28, 1939, the Special Commissioners gave a direction under s. 21, sub-s. 1, of the Finance Act, 1922, as extended by s. 14, sub-s. 2 (*a*), of the Finance Act, 1937, that for the purposes of assessment to sur-tax the actual income of the company for the year of assessment should be deemed to be the income of the members. On December 19, 1939, pursuant to s. 14, sub-s. 3, of the Finance Act, 1937, they apportioned the income as follows: to the trustees of the "B" shares, 100*l.*; to the holders of the "C" shares, 7*l.* 11*s.*; to the trustees, the holders of the "A" shares, 81,866*l.* 11*s.* 1*d.*, attributing to the members amounts corresponding to their interests in the assets in the event of a liquidation. The amount apportioned to the trustees of the "A" shares was assessed to sur-tax as the second appellant's income by virtue of s. 38, sub-ss. 2 and 3, and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938. The company appealed against the direction and apportionment and the second appellant appealed against the assessment. It was admitted that the assessment was correct if the direction and apportionment were upheld. Macnaghten J. dismissed the appeal and the Court of Appeal (Lord Greene M.R., Clauson and du Parcq L.JJ.) affirmed his decision. The appellants appealed to the House of Lords.

Tucker K.C. and *L. J. Stein* for the appellant. Before s. 21 of the Finance Act, 1922, which has effect as relating to sur-tax (see s. 42, sub-s. 10, of the Finance Act, 1927) can be applied and before any direction can be made, it must be shown that the company was in a position to have "distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super-tax, a reasonable part of its actual income." In this case the direction was invalid. Sur-tax applies to the income of an individual and is charged in respect of his "total income from all sources": see s. 38, sub-s. 1, of the Finance Act, 1927. It cannot apply to a trustee in respect of income received by him for the benefit

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of another. That, for sur-tax purposes, is part of the beneficiary's income. The only shares in this company which can receive any dividend are the " B " shares which are all registered in the names of trustees, so that the company cannot distribute any part of its income in the manner defined by s. 21. Lex non cogit ad impossibilia and this maxim particularly applies to a penal provision such as that in question here. This section and s. 14, sub-s. 2, of the Finance Act, 1937, presuppose that the shares of any company to which they are to be applied are so held that at least one of its members is liable to include his proportion of any of its distributed income in a statement to be made by him for the purposes of sur-tax. By s. 21 a discretion is conferred on the Special Commissioners to make a direction. The section is not imperative. It cannot be a proper exercise of the commissioners' discretion to give a direction that a reasonable part of the company's income has not been distributed in the manner defined by the section when the company was not in a position to make such a distribution: see *Thomas Fattorini (Lancashire), Ld.* v. *Inland Revenue Commissioners* (1). The condition precedent to the giving of a direction did not arise. Further, the apportionment is invalid for an apportionment can only be made on members of the company on whom sur-tax can be assessed and charged, i.e., members who have a beneficial interest in the capital or income of the company, but the trustees holding these shares have no beneficial interest in them, and, consequently, sur-tax cannot be assessed and charged on them. It is true that s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938, contemplates an apportionment under s. 21 of the Act of 1922 " to the trustees of, or a "beneficiary under, the settlement," but in enacting that the legislature made an erroneous assumption as to the previous state of the law: see *Ormond Investment Co., Ld.* v. *Betts* (2). It is not legitimate to look at a statute to construe an earlier statute of which the meaning is plain. Only if the first statute is ambiguous, and the second proceeds on the footing that it has a certain meaning, can there be said to be a legislative interpretation of it: see Craies on Statute Law, 4th ed., p. 444. If it be held that the company was able to distribute its income in the manner defined by s. 21, the part of its actual income distributed during the year was a reasonable part and there is no evidence that it was unreasonable not to distribute a larger part during that year. The onus is on the Crown to establish that what was done was not reasonable: see *Thomas Fattorini (Lancashire), Ld.* v. *Inland Revenue Commissioners* (1). The power vested in the Special Commissioners to apply the alternative method of apportionment provided for by s. 14, sub-s. 3, of the Finance Act, 1937, i.e., to " attribute to each member an interest corresponding "to his interest in the assets of the company available for "distribution among the members in the event of a winding-"up " is a discretionary power and the present case was not a case in which it could properly be exercised, since, at the time of the apportionment, all but an insignificant fraction of the actual income of the company for the year of assessment had already been distributed to the holders of the " B " shares, so that the trustees of the " A " shares could never in any circumstances have received the income or assets representing it. In the circumstances there was not a judicial exercise of their discretion by the Special Commissioners. Finally, an apportionment must be made among all the members of the company in accordance with their respective interests, and there was in this case an apportionment to certain members, i.e., the trustees of the " A " shares, to the exclusion of others, i.e., the beneficiaries.

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(1) [1942] A. C. 643, 656.

(2) [1928] A. C. 143.

Sir David Maxwell Fyfe S.-G., J. H. Stamp and *R. P. Hills* for the respondents. The direction was rightly made under s. 21, sub-s. 1, of the Finance Act, 1922; the income was rightly apportioned under s. 14, sub-s. 3, of the Finance Act, 1937, to the trustees, as members of the company; and the second appellant was rightly assessed to sur-tax under s. 38 and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938. The difficulties arise from the fact that, in dealing with cases like the present, one is everywhere in the realm of fantasy. For the purposes of taxation companies are incorporated with structures never seen in ordinary commercial life, and to prevent the avoidance of taxation the Crown is often obliged to "deem" one thing to be another. The appellants' reading of s. 21 of the Act of 1922 would require the implication of the words "provided "that the company is found to have a member who is liable "to make a return for the purposes of sur-tax." The respondents would imply the words "in every case where a member "may be liable to make a return for the purposes of super-tax," which is equivalent to the phrase of Clauson L.J. in the Court

(1) [1942] A. C. 643.

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of Appeal (1) "super-taxable in the hands of a person whose "income is super-taxable." The latter alternative is to be preferred for the following reasons: (*a*) The language of the section itself and of sch. I. to the Act favours it; (*b*) The processes of direction, apportionment, and assessment are separate and distinct; (*c*) The provisions of subsequent Finance Acts make it clear that an apportionment, of which a direction is a prerequisite can be made on persons who are not sur-tax payers, i.e., companies and trustees. The legal effect for which the respondents contend is so clearly recognized in the subsequent statutes that to deny it would be to abrogate the proviso to s. 20, sub-s. 1, of the Finance Act, 1936, and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938. "The burden of proving that the legislature has fallen into a "mistake is cast upon those who say so": per Lord Campbell C.J. in *Reg.* v. *Lords Commissioners of the Treasury* (2). (*d*) The appellants' construction would enable them to defeat the consequences of non-distribution by their own arrangement of their shareholding. A person who cannot fulfil the requirements of s. 21 of the Act of 1922 because he has taken steps to dispossess himself of his income should not be protected. The operative part of s. 21 of the Act of 1922 is clear. The phrase beginning "in such manner" is a description of the mode of distribution of the company's income and does not relate to the result of the distribution on shareholders of any particular class: *Inland Revenue Commissioners* v. *Blott* (3); *Inland Revenue Commissioners* v. *Burrell* (4). Accordingly, it is possible to give a direction in a case where all the shares are held by trustees, and to follow this by an apportionment to them. By para. 8 of sch. I. to the Act of 1922: "The apportionment of the actual income from all sources of the company shall be made by the Special Commissioners in "accordance with the respective interests of the members, and "the income as apportioned to each member . . . . shall, for "the purposes of super-tax be deemed to represent . . . . "income from his interest in the company for the year or other "period and shall be included in the statement of his total "income or in an amended statement of total income which "the Special Commissioners are hereby authorized to require ". . . ." By para. 11: "Any person in whose name any shares "of a company are registered shall, if required by notice in

(1) [1942] 1 K. B. 420, 431.
(2) (1851) 16 Q. B. 357, 362.
(3) [1921] 2 A. C. 171.
(4) [1924] 2 K. B. 52.

"writing by the Special Commissioners, state whether or not "he is the beneficial owner of those shares, and if not the "beneficial owner of those shares or any of them shall furnish "the name and address of the person or persons on whose "behalf the shares are registered in his name . . . ." The paragraph provides a penalty for failure to comply. Before the statement contemplated can be required there must be an apportionment, and, accordingly, it must be possible to apportion to trustees. If s. 21 is interpreted as the respondents suggest there is a workable scheme, but otherwise there is no sanction against trustees refusing to comply with a requirement to make a statement. Trustees cannot be assessed, but dividing the company's income into portions is not the same thing as fixing liability to tax. Direction and apportionment are mere machinery and tax no one. The apportionment to trustees is an umbrella covering also the beneficiaries. The apportionment can be either to the trustee or to the beneficiary if the Special Commissioners know that the shareholder on the register is a trustee. Subsequent statutes having recognized the interpretation of s. 21 for which the respondents contend, the court cannot proceed on the assumption that the legislature has made a mistake: Craies on Statute Law, 4th ed., p. 443. The enunciation in a statute of a proposition of law is strong evidence of what the law really is: see *Norton* v. *Spooner* (1). In this case there is the closest connexion between s. 21 of the Act of 1922 and the subsequent enactments. There was jurisdiction to make the apportionment to the trustees, because they were members as defined by sub-s. 7 of s. 21, i.e., persons having an "interest "in the capital or profits or income" of the company. "Interest" is a word capable of wide meaning: *Inland Revenue Commissioners* v. *Tring Investments, Ld.* (2). The sense adopted should be that which best harmonizes with the context and promotes the policy of the legislature: Maxwell on Interpretation of Statutes, 8th ed., pp. 240-241. Further, all exceptions to taxation increase the burden on the community and should be deprecated: Ibid. 253. [They also referred to *Williams* v. *Singer* (3) and *Alexander Drew & Sons, Ld.* v. *Inland Revenue Commissioners* (4).] The exercise by the Special Commissioners of their discretion under s. 14, sub-s. 3, of

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(1) (1854) 9 Moore P. C. 103, 128, 129.

(2) [1939] 2 K. B. 503, 513.

(3) [1921] 1 A. C. 65, 71.

(4) (1932) 17 Tax Cas. 140.

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the Act of 1937, was proper in the circumstances of the case.

Tucker K.C. in reply. Apportionment cannot be made to a trustee since one cannot apportion to a person who has no beneficial interest. Direction, apportionment and assessment are all one continuous process.

The House took time foı consideration.

Apr. 19. VISCOUNT SIMON L.C. My Lords, this is an appeal from a decision of the Court of Appeal (Lord Greene M.R., Clauson and du Parcq L.JJ.) affirming a judgment in favour of the Crown pronounced by Macnaghten J. on a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, who had upheld a direction given and apportionment made in respect of the income of the appellant company for the year 1937-38, under s. 21 of the Finance Act, 1922. This section, as its opening words declare, was passed "with a view to preventing the avoidance of the "payment of super-tax" (now sur-tax) "through the with-"holding from distribution of income of a company which "would otherwise be distributed." The Special Commissioners followed up the direction (dated August 28, 1939) and the apportionment (dated December 19, 1939) by an assessment on the second appellant of 81,867*l.* as "settlor": see s. 38, sub-ss. 2 and 3, and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938; but it is unnecessary to trace out the application of these complicated sections since it is admitted that this assessment is correctly made if the direction and apportionment are upheld.

The appellant company is a company to which s. 21 applies, and is moreover an "investment company" as defined by s. 20, sub-s. 1, of the Finance Act, 1936. It was incorporated on June 10, 1937, and its nominal and issued capital amounted to 856*l.* 11*s.* The company's structure is unusual, and when it is added that in its first year of life this company, with its modest capital of 856*l.* odd, made a profit (mainly from shares it had acquired in Penang Rubber Estates Co., Ld.) of 81,974*l.* 2*s.* 1*d.*—i.e. at the rate of 9,500 per cent on its capital—it may be safely inferred that the whole arrangement was entered into in the hope of escaping sur-tax thereby. This, however, is not the point. The appellants are entitled to succeed, whatever the purpose of these arrangements may be, unless the provisions of the relevant statutes authorize

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the direction and the apportionment which have led to the assessment.

The main contention of the appellants is a contention of law arising on the construction of s. 21. As sur-tax applies to the income of an individual: s. 38, sub-s. 1, of the Finance Act, 1927; and is charged in respect of a "total income from all "sources" of that individual when this exceeds the exempted minimum, it is clear that the tax cannot apply to a trustee in respect of income coming to him on trust and received by him for the benefit of another. Such income, for purposes of sur-tax, is part of the total income of the beneficiary. The appellants argue that, inasmuch as the only shares in the company that can receive any dividend are the "B" shares, and the "B" shares are all registered in the names of trustees, it is impossible for this company to distribute to its members any part of its income "in such manner as to render the "amount distributed liable to be included in the statement to "be made by the members of the company of their total "income for the purposes of sur-tax." The argument then is that, since lex non cogit ad impossibilia, it cannot be within the powers of the Special Commissioners (or, at any rate, cannot be a proper exercise of their powers) under s. 21 to give a direction on the view that a reasonable part of the company's income has not been distributed "in such manner" when the company is not in a position to make any such distribution at all. The argument, in my opinion, breaks down in limine. The phrase in the section refers to a mode of distributing the company's income and not to the result of the distribution on shareholders of a particular class. In *Inland Revenue Commissioners* v. *Blott* (1), this House decided that a company with undistributed profits could, by suitably devised arrangements, distribute bonus shares "in such "manner" that the distribution was a distribution of capital and not of income. *Inland Revenue Commissioners* v. *Burrell* (2) was a further illustration of the same principle. Yet another decision which illustrated how a company's profits could be distributed in a manner which did not expose the recipient to super-tax is *Inland Revenue Commissioners* v. *Sansom* (3). It is not without significance that these cases arose shortly before the Finance Act, 1922, was passed. Again, if a company with undistributed profits goes into liquidation,

(1) [1921] 2 A. C. 171.
(2) [1924] 2 K. B. 52.
(3) [1921] 2 K. B. 492.

its assets are distributed to the contributories "in such "manner" that they are capital in their hands. It is the contrast between a manner of distribution which gives the opportunity for the law providing for sur-tax to be applied, and a manner of distribution which cannot result in attracting sur-tax, which is the distinction at which s. 21 is aimed. The authority of the Special Commissioners to make a direction under s. 21 in cases where it appears to them that the company has not made a reasonable distribution is not in the least affected by the fact that the recipients are trustees. The appellants' first point, therefore, fails.

The next point to be considered is whether an apportionment under s. 21 can be rightly made (as was the case here) to trustees on the share register. The argument urged against this seems to assume that the assessments to sur-tax must be made on the same persons as are named in the apportionment, but is this so ? The section, as amended by the Finance Act, 1927, s. 31, sub-s. 2, says that the direction is made "for purposes of assessment," and that, on apportionment among the members, "super-tax shall be assessed and charged ". . . . in respect of the sum so apportioned," but it does not say that the individual named in the apportionment is necessarily the individual to be assessed. If a part of the income is apportioned to a shareholder who is a trustee holding the share in trust for a beneficiary, it would be the beneficiary who would be assessed. A statement of income from all sources must include amounts received from a trustee. Moreover, by sub-s. 7 of s. 21 "the expression 'member' "shall include any person having a share or interest in the "capital or profits or income of a company." I incline to think that, inasmuch as the apportionment is "amongst "the members," it would be legitimate for the Special Commissioners to apportion a proper fraction to the beneficiary in the first instance if they already knew that the shareholder on the register was a bare trustee. Information as to this could be obtained under para. 11 of sch. I., but whether the Special Commissioners have the information, and act on it, in the first instance, or not, it seems to me clear that an original apportionment to a trustee may properly be followed up by an assessment on the beneficiary.

I should be prepared to reach the conclusion that an apportionment can be made to shareholders who are trustees by interpreting the words of s. 21 as they stand. This view, moreover, is certainly the view taken by the legislature when enacting para. (ii.) of s. 41, sub-s. 4 (*a*), of the Finance Act, 1938, which defines "income arising under a settlement," for that paragraph, when referring to apportionment under s. 21 of the Act of 1922, contemplates an apportionment of income "to the "trustees of, or a beneficiary under, the settlement." The appellants, quoting *Ormond Investment Co., Ld.* v. *Betts* (1), are driven to contend that this is an erroneous assumption made by the legislature as to the previous state of the law—a contention particularly difficult to sustain in a Finance Act which is to be read with previous Finance Acts as a single code, but for the reasons already given, the assumption is correct.

This is really the end of the case, for it was admitted on behalf of the present appellants before Macnaghten J. that the appellant company did not distribute within the year of assessment a reasonable part of its income. The penal provisions of s. 21 of the Act of 1922 originally applied only if it appeared to the Special Commissioners that there had not been a distribution of a reasonable part of the company's income "within a reasonable time after the end of any year," etc., but by s. 14, sub-s. 2 (*a*), of the Finance Act, 1937, the Special Commissioners are empowered, if they think fit, to give a direction in the case of an investment company (which the appellant company is) where the company has not "within "any year of assessment distributed . . . . a reasonable part "of its actual income from all sources for that year." This admission having been made, it was not open to the appellants to argue that there was no sufficient evidence to support this conclusion. Indeed, the case stated raises no such contention. On the whole matter I am of opinion that the appeal fails, and I move that it be dismissed with costs.

My Lords, my noble and learned friend LORD ATKIN authorizes me to say that he agrees with this opinion.

LORD THANKERTON. My Lords, I agree with the noble and learned lord on the woolsack. In view of the admissions in this case, it is only necessary to deal with the two main arguments of the appellant, which respectively challenged the validity of the direction and the validity of the apportionment under s. 21, sub-s. 1, of the Finance Act, 1922, as subsequently amended, it being admitted that the appellant company is one to which the section applies.

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(1) [1928] A. C. 143.

The conditions precedent to the issue of a direction are that it should appear to the commissioners that the company has not, within the period prescribed, "distributed to its "members in such manner as to render the amount distributed "liable to be included in the statements to be made by the "members of the company of their total income for the purposes "of super-tax a reasonable part of its actual income from all "sources" for the prescribed period. The appellants maintain that, as the only registered shareholders to whom a distribution of income by way of dividend could have been made were the trustees of the "B" shares settlement, who were not liable to super-tax, there could be no distribution in the manner predicated by the section, and that, especially in a penal provision such as this section, the maxim lex non cogit ad impossibilia applies, and, accordingly the condition precedent to the issue of a direction cannot arise and the direction in this case was unwarranted by the terms of the section. The argument of the appellants was that where all the registered shareholders of a company, to whom a distribution of its net income could be made, were trustees with only a fiduciary interest in their holding, the section could not apply, but the appellants conceded that their contention would be defeated if only one of such shareholders had the beneficial interest in his holding. This concession, in my opinion, does not help them at all.

I am unable to accept the appellants' construction. In my opinion, the words which I have quoted refer to the quality of the distribution predicated. It appears to me to be clear that this part of sub-s. 1 had within its purview the failure of a company to distribute a reasonable part of its income as income, which, in an appropriate case, would render it returnable as part of the recipient's total income for purposes of super-tax. My construction of the words quoted may easily be expressed by the substitution of 'would' for 'to' and the insertion of the words 'if any' after 'statement,' as follows: "distributed to its members in such manner as *would* render "the amount distributed liable to be included in the statements, "*if any*, to be made by the members of the company of their "total income for the purposes of super-tax." Accordingly, the appellants' ground of challenge of the direction fails, and, in that view, the appellants did not dispute the finding that the company had failed to distribute a reasonable amount of its actual income within the prescribed period.

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The appellants' challenge of the validity of the apportionment was based on the view that the apportionment, according to the terms of sub-s. 1 of s. 21, as amended, could only be made on members of the company, on whom super-tax could be assessed and charged, that is, on members who had a beneficial interest, and that the apportionment in the present case, which was made on trustees only, was invalid. I am of opinion that the appellants' construction is too narrow, and that this is sufficiently demonstrated by paras. 8 and 11 of sch. I. to the Act of 1922 which contemplate the ascertainment of the beneficial owner after the apportionment has been made. This does not necessarily exclude the ascertainment of the beneficial owner before making the apportionment. I am, therefore, of opinion that the apportionment on the trustees was valid, and, in that view, the appellant has conceded that the assessment is correct. This concession relieves me from considering, in the present case, whether, in view of the terms of sub-s. 2 of s. 21, there should be an apportionment, whether original or amended, on the member sought to be assessed and charged, and I express no opinion on that point. Accordingly, I agree in the motion proposed by my noble and learned friend.

Lord Macmillan. My Lords, the Special Commissioners of Income Tax, professing to exercise the powers conferred on them by s. 21 of the Finance Act, 1922, and s. 14, sub-ss. 2 and 3, of the Finance Act, 1937, directed that for the purpose of the assessment of surtax the actual income of the appellant company for the year of assessment ending April 5, 1938, should be deemed to be the income of its members and, further, made an apportionment of the actual income of the appellant company among the members, whereby a sum of 81,866*l.* 11*s.* 1*d.* was apportioned to the trustees of a settlement made by the appellant, Sir John Ramsden, consequent on which an additional assessment to surtax in that sum was made on him as the settlor. The appellants challenge the validity both of the direction and of the apportionment. It was admitted that the company was an investment company within the statutory meaning and that the relevant legislation applied to it. I shall throughout refer to sur-tax without discriminating it from the super-tax which it superseded.

In order that the Special Commissioners may give a direction under s. 21, sub-s. 1, of the Finance Act, 1922, as amended by s. 14, sub-s. 2, of the Finance Act, 1937, in the case of a company such as the appellant company, it must appear to them that the company has not within the year of assessment "distributed to its members in such manner as to "render the amount distributed liable to be included in the "statements to be made by the members of the company of "their total income for the purposes of sur-tax, a reasonable "part of its actual income from all sources" for the year of assessment. Under the constitution of the company the only distribution of any part of its actual income which it could competently make was to the holders of the "B" shares, and the holders of these shares, being trustees, were under no obligation to make a statement of total income for the purposes of sur-tax. Consequently, it was argued, the appellant company could not make any distribution of its income, reasonable or unreasonable, in such manner as to render the amount distributed liable to be included in statements to be made by the members of the company of their total income for the purposes of sur-tax. The only parties to whom the company could make any distribution were trustees who were under no liability to make a return of total income for sur-tax purposes. If the company could not distribute any of its income in such a manner as to have the result indicated it could not appear to the Special Commissioners that it had not distributed a reasonable part of its income in that manner. This argument, in my opinion, is based on a misreading of the language of s. 21 of the Act of 1922. The section may not be happily expressed, but its meaning is plain enough, once its origin and purpose are understood. The circumstance that the income of a company is not in general liable to sur-tax in its hands, but becomes liable to sur-tax only in the hands of its members after distribution among them, so far as the total income of the recipient members renders them liable to sur-tax, naturally suggested a means of evading liability to sur-tax. If a company refrained from distributing its income among its shareholders or distributed only a small part of its income, then its income altogether or pro tanto escaped sur-tax, but if no distribution or only an inadequate distribution of income were made the shareholders got no benefit or only an inadequate benefit. So resort was had to means of distributing the profits of a company in such a way that they should reach the shareholders otherwise than as income liable to sur-tax. There were various ways of achieving this result. Thus, the company might convert its undivided profits into paid-up capital and then make a bonus allotment of the new shares among its shareholders. The distribution of these shares did not constitute a distribution of income, and the recipients were under no obligation to include the value of the shares in their return of total income for sur-tax purposes: *Inland Revenue Commissioners* v. *Blott* (1). The same result could be attained by the issue of debentures or debenture stock. It was thus possible by resort to such expedients to effect a distribution of a company's profits among its members "in "such manner as" *not* "to render the amount distributed "liable to be included in the statements to be made by the "members of the company of their total income for the purposes "of" sur-tax. The section is designed to meet the cases where a company refrains from distributing any or a reasonable part of its income, or, by utilizing one of the expedients indicated, distributes its income in such a manner that the recipients are under no obligation to include what they receive in any return of total income which they are bound to make. In such cases the Special Commissioners are empowered to make a notional distribution of the company's income, disregarding what the company has actually done. The condition precedent of the operation of the section is not that the company should have failed to make such a distribution of its income that all, or at least some of, the recipients should be liable to return what they receive in statements of total income for sur-tax. The condition is that the company should have failed to make a distribution of its income in such a form as to oblige the recipients to include what they receive in any statement of total income which they may be liable to make for sur-tax purposes. If it makes a reasonable distribution in this form it is immaterial that some or all of the recipients happen not to be liable to make a return of total income for sur-tax purposes. It is the character of the distribution, not its ultimate tax effect, that is referred to in the section. Applying this reading of the section to the present case, I see no obstacle to the issuing of a direction by the Special Commissioners in the fact that the only members of the company to which the company could make a distribution of its income happened to be trustees who were under no obligation to make a return of total income for sur-tax purposes.

(1) [1921] 2 A. C. 171.

If, then, it was competent for the Special Commissioners in the present instance to issue a direction under the section, the next question is whether they made a valid apportionment of the company's income. The apportionment is to be "among "the members" of the company, but it may be a very different apportionment from that which the company itself could have made. The section contains a sub-s. 7 which enacts that "the expression 'member' shall include any person "having a share or interest in the capital or profits or income "of a company." A company can distribute its profits only among its registered shareholders, but the Special Commissioners in their apportionment are not so restricted. Further, under s. 14, sub-s. 3, of the Finance Act, 1937, the Special Commissioners in making their apportionment "may, if it "seems proper to them so to do, attribute to each member an "interest corresponding to his interest in the assets of the "company available for distribution among the members in "the event of a winding up." The apportionment may be among the members or to each class of shares: Finance Act, 1922, sch. I., para. 10. Power is conferred on the Special Commissioners to require information as to the beneficial ownership of any shares: Ibid., para. 11. What the Special Commissioners did in the present case was to apportion the actual income of the company to the shareholders on the register in accordance with their interests in the assets of the company on a winding up. Under the constitution of the company the holders of the "B" ordinary shares and of the "C" voting shares were entitled on a winding-up to receive payment only of the amount paid up on their shares, namely, 100*l.* and 7*l.* 11*s.* All the rest of the surplus assets belonged to the holders of the "A" ordinary shares. These "A" shares, like the "B" shares, were also the subject of a deed of settlement by the appellant, Sir John Ramsden, which was dated June 24, 1937, and was varied by a subsequent deed of December 7, 1937. The result of the Special Commissioners' appropriation of the actual income of 81,974*l.* 2*s.* 1*d.* was, accordingly, to attribute 100*l.* to the trustees who were the holders of all the "B" shares, 7*l.* 11*s.* to the ten individual holders of the "C" shares, and the balance of 81,866*l.* 11*s.* 1*d.* to the trustees who were the holders of all the "A" shares. If the trustees of the "A" shares had been bare trustees for the distribution of the trust income among beneficiaries, the Special Commissioners, availing themselves of the expanded definition of "member," might, no doubt, have made an apportionment among the beneficiaries instead of to the trustees, but the provisions of the trust deed, which it is not necessary to particularize, precluded this. It was not a bare trust. The apportionment to the trustees of the "A" shares was challenged on the ground that as trustees they had no beneficial interest in the shares and were under no obligation to make a return of total income for sur-tax purposes. In my opinion, the Special Commissioners, in virtue of their powers as already set out and construed, were entitled to apportion the sum of 81,866*l.* 11*s.* 1*d.* to the trustees of the "A" shares, who were the registered holders of these shares (though, of course, not qua trustees), and members of the company. It was immaterial that they were under no liability to make a return of the total trust income for sur-tax purposes. It is to be noted that s. 41, sub-s. 4 (*a*) (ii.), in part IV. of the Finance Act, 1938, which by s. 55 of that Act is to be construed as one with the Income Tax Acts, makes express reference to the case of an apportionment under s. 21 of the Act of 1922 to trustees under a settlement. It is, of course, true, that the trustees of the "A" shares were not liable to pay sur-tax on this income notionally attributed to them, but the resources of the law were not exhausted. The Special Commissioners next invoked s. 38, sub-ss. 2 and 3, and s. 41, sub-s. 4 (*a*) (ii.), of the Finance Act, 1938, and treated the income of the trustees as the income of the settlor, namely, the appellant, Sir John Ramsden, on whom, accordingly, an additional assessment to sur-tax in the sum of 81,867*l.* was made. It is unnecessary to discuss the justification of this last step, for it was admitted, as appears from the stated case, that, if the direction and the apportionment were in order, as I hold them to have been, then the personal assessment on the appellant Sir John Ramsden was correct.

There are two matters I should mention in conclusion. It appears that the company after the conclusion of the year of assessment ending April 5, 1938, in point of fact paid a final dividend of 60,500*l.* net to the holders of the "B" shares. The appellants in their printed case to this House maintained that in the circumstances the company had made a reasonable distribution of its income in the year of assessment, and that the Special Commissioners were, consequently, not justified in issuing their direction. The appellants, however, admitted that in the courts below they had accepted the position that the company had not distributed a reasonable part of its income in the year of assessment. This point was, accordingly, not open to the appellants in this House, and your Lordships decided to express no opinion on it. The other point is that, as a result of the apportionment, the 2000*l.* distributed by way of interim dividends to the "B" shareholders would appear to be brought twice into assessment. The matter was left somewhat obscure, but an assurance was given by the Solicitor-General that the proper steps would be taken to prevent any double taxation. The appeal should, in my opinion, be dismissed.

LORD ROMER. My Lords, your Lordships are in possession of the material facts in this case and I need not repeat them. Whether upon those facts there was evidence on which the Special Commissioners could properly find that the company had not within the year of assessment ending April 5, 1938, distributed to its members a reasonable part of its income for that year is a question that your Lordships cannot be called upon to decide in this appeal. In the case submitted for the opinion of the court the several contentions of the appellants are quite clearly stated, and they do not include a contention that there was no such evidence. Nor was any such contention advanced by the appellants either before Macnaghten J. or before the Court of Appeal. It is too late for them to advance it now. Nor are your Lordships asked to decide the question whether, on the assumption that the direction and apportionment given and made by the Special Commissioners under the provisions of s. 14, sub-ss. 2 and 3, of the Finance Act, 1937, can be justified, the assessment of 81,867*l.* on Sir John Ramsden was properly made. It has been admitted by Sir John that on that assumption the assessment on him cannot be successfully attacked. In these circumstances, I refrain from expressing any opinion on either of the two questions to which I have referred, and will turn at once to a consideration of the two other questions, which are the only ones that have to be decided on this appeal. The first of them is this. Can a direction be given under s. 21, sub-s. 1, of the Finance Act, 1922, or s. 14, sub-s. 2, of the Finance Act, 1937, where all or some of the shares in the company concerned are held by trustees? The second of the questions is whether the apportionment made in the present case under sub-s. 3 of the last mentioned section was a proper exercise by the

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Special Commissioners of the discretion that the sub-section gives them.

The appellants contend that a negative answer should be given to both of these questions. As to the first of them, their contention is as follows. Both sub-s. 1 of s. 21 of the Finance Act, 1922, and sub-s. 2 of s. 14 of the Act of 1937 pre-suppose that the shares of any company to which they are to be applied are so held that one at least of its members is liable to include his proportion of any income of the company distributed to its members in a statement to be made by him of his total income for the purposes of sur-tax. If, therefore, there be no such member, as will be the case if all the members are trustees, no direction, it is said, can be given under either sub-section. As to this, I would observe, in the first place, that to be logical the appellants should contend that no company can be the subject of a direction under either sub-section unless every one of its members is liable to include any income of the company distributed to him in a statement of his income for the purposes of sur-tax. For the words of each sub-section are "as to render the amount distributed "liable to be included in the statements to be made by the "members," and this means the whole amount distributed. But I am satisfied that the sub-sections apply to a company even though there is no single member who can be called on to include any income of the company distributed to him in a statement of his income for the purposes of sur-tax. The sub-sections, I think, contemplate two possibilities and two only. The first is that the company may have altogether failed to distribute a reasonable part of its income. In that case the company will necessarily have failed to distribute the income in the particular manner referred to in the sub-sections because it will have failed to distribute it in any manner at all. The words "in such manner" can have no reference to such a case. The other possibility is that the company has, in fact, distributed a reasonable part of its income among its members, but has not distributed it as income. The company, for instance, may have capitalized it and distributed it as capital. In such a case the amount distributed would not be liable to be included in the statements made by the members for the purpose of sur-tax, whether they were trustees or not. It would not have been distributed in the manner mentioned in the sub-sections, and, consequently, a direction could be given by the Special Commissioners.

There is, of course, yet another possibility. The company may have distributed a reasonable part of its income as income, but, owing to one or more of its members being trustees, the whole amount distributed will not have been liable to be included in sur-tax statements. If a direction could be given in such a case and an apportionment then made under s. 14, sub-s. 3, of the Act of 1937 in accordance with the interests of the members in the assets of the company available for distribution in a winding-up, quite fantastic results might ensue. But, in truth, this third possibility is in no way covered by the words of the sub-sections. In cases where there has been a distribution of a reasonable part of the income of a company the sub-sections are, in my opinion, on their true construction concerned only with the nature of what has been distributed and not with the nature of the persons among whom the distribution has been made. If what has been distributed be a reasonable part of the company's income, but be of such a nature that it would not be liable to be included in the sur-tax statements of any recipients, the whole income of the company can be made the subject of a direction. If, however, income has been distributed as income, no direction can be given merely because all or some of the members are trustees. It is true that in such case the whole amount distributed will not be liable to be included in sur-tax statements of the members. But this will not be because of the manner of its distribution but because of the nature of the persons among whom it has been distributed, and that is a matter with which the sub-sections are in no way concerned. In the present case, for the reasons already mentioned, it must be taken that in the year ending on April 5, 1938, the appellant company did not distribute a reasonable part of its income for that year. It follows that the Special Commissioners were entitled to give a direction under s. 14, sub-s. 2, of the Finance Act, 1937, in spite of the fact that the holders of all the "A" and "B" shares were trustees.

The only other question to be decided is whether, having given such a direction, the Special Commissioners properly exercised their discretion in making the consequent apportionment among the members under s. 14, sub-s. 3, of the Act of 1937, instead of in accordance with the members' interests in the company's income. As to this, I have little to say. Had the apportionment been made in the latter way the whole income of the company for the year in question would have

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been allotted to the trustees of the "B" shares. Whether in that case any income so allotted could have been treated for the purposes of sur-tax as the income of the appellant is a question that has not been discussed before your lordships. If it could not, the appellant has, of course, been seriously prejudiced by the way in which the Commissioners have exercised their discretion. If, on the other hand, it could be so treated, the appellant has been prejudiced by reason of the fact that an apportionment to the trustees of the "B" shares would have been subjected to a deduction of the 2000*l.* gross paid to them as dividends in the year in question. This deduction would have been made under the words introduced at the end of s. 21, sub-s. 1, of the Act of 1922 by s. 31, sub-s. 2, of the Finance Act, 1927. He has been further prejudiced in that he will not be able to get recoupment of the sur-tax that may be paid by him on the 81,867*l.* as he would have done under para. 1 of sch. III. to the Finance Act, 1938, had the apportionment of the whole income of the company been made to the trustees of the "B" shares, for no income can arise at present under the settlement of the "A" shares to the trustees or any other person. I am not, however, prepared to deduce from these circumstances that the commissioners have not properly exercised their discretion. It is reasonably plain from the history of this case that Sir John Ramsden is one of those persons who rightly or wrongly exercise much ingenuity in discovering gaps in the nets spread by the legislature from time to time to collect sur-tax for the national revenue, and in so arranging their affairs as to escape through one or more of such gaps. If Sir John sees no impropriety in exercising for this purpose the powers of managing his affairs that are allowed to him by the laws of the country, it does not lie in his mouth to accuse the Special Commissioners of impropriety if they choose to exercise the powers given to them by these same laws in such a way as to defeat Sir John's object, and procure for the national revenue as large an amount from sur-tax as is possible in the circumstances. My Lords, for these reasons I would dismiss this appeal.

Appeal dismissed.

Solicitors for appellants: *Capel Cure, Glynn Barton & Co.*
Solicitors for respondents: *Solicitor of Inland Revenue.*

F. H. C.

[PRIVY COUNCIL.]

SYNDIC IN BANKRUPTCY OF SALIM NASRALLAH KHOURY . . . . } APPELLANT ;

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AND

KHAYAT . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Promissory note—Promise to pay "Turkish gold pounds"—Rate of exchange—Calculation as at date of maturity—Bills of Exchange Ordinance, 1929, *s.* 72, *sub-s.* 4; *s.* 84, *sub-s.* 1—*Palestine Order in Council,* 1922, *s.* 46.

An instrument executed in Palestine, signed by the maker and duly stamped, and stating "On May 23, 1930, I shall pay at "Haifa to the order of Mrs. Mary Khayat of Jezzin [Syria] the "sum specified above, i.e., two thousand gold Turkish pounds. "Value received in cash. Haifa, Oct. 11, 1929," is a promissory note, whether the definition applied be that contained in s. 84, sub-s. 1, of the Bills of Exchange Ordinance, 1929, or that contained in art. 145 of the Ottoman Commercial Code. It is a promise to pay in currency, though not in that of the country where the note is made and payable, and is therefore an unconditional promise to pay a sum certain in money, and the payee is consequently entitled to interest from the date of maturity.

Judgment of the Supreme Court of Palestine on this point affirmed.

In the absence of any rule of law to the contrary in Palestine, the English rule that in such a case the correct date for determining the rate of the exchange from foreign into local currency is that of the breach by non-payment, is, by virtue of s. 46 of the Palestine Order-in-Council, 1922, applicable in Palestine. Accordingly, the conversion from Turkish to Palestinian currency must take place at the rate of exchange ruling at the date of maturity of the promissory note and not at the date of any actual payment made subsequently.

Ahmad Hassan Abu Laban v. *Bergman* (1932) 2 Rotenberg 658: and *Abu Labban* v. *Lieder & Fisher* (1932) 2 Rotenberg 644, dissented from.

Further, although the promissory note was drawn in, and not out of, Palestine, nevertheless the essence of the rule in s. 72, sub-s. 4, of the Bills of Exchange Ordinance, 1929, was applicable, and the Ordinance involved an authoritative declaration of the proper rule to apply to the calculation of the exchange in such a case as the present.

Judgment of the Supreme Court of Palestine on this point reversed.

**Present:* LORD RUSSELL OF KILLOWEN, LORD WRIGHT, LORD PORTER, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

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APPEAL (No. 1 of 1942) from a judgment of the Supreme Court of Palestine sitting as a court of civil appeal (April 24, 1940) confirming a judgment of the District Court of Haifa (January 17, 1940).

The following facts are taken from the judgment of the Judicial Committee: The respondent, who was resident in Jezzin, Syria, began the action out of which this appeal arose, on October 27, 1937, claiming 2347 Turkish gold pounds as due on three promissory notes. One issue was whether those three instruments were or were not promissory notes. One was for 2000 Turkish gold pounds, and matured on May 23, 1930; the second was for 300 Turkish gold pounds, and matured on the same date; the third was for 47 Turkish gold pounds, and matured on October 21, 1929. The first, as translated from the Arabic, ran simply: "On May 23, 1930, I "shall pay at Haifa to the order of Mrs. Mary Khayat of "Jezzin the sum specified above [that is, in the heading] i.e. "two thousand gold Turkish pounds. Value received in cash, "Haifa, 11 October 1929." It was signed by the appellant, and duly stamped. The others were mutatis mutandis in identical terms. The appellant, who was the syndic in the bankruptcy of the firm, S. N. Khoury, merchants, of Haifa, Palestine, did not deny the execution of the instruments, but he contended that they were, not promissory notes, but undertakings to deliver certain commodities, namely, the quantity of bullion represented by the specified Turkish gold coins or the corresponding number of Turkish notes. He resisted a claim for interest, and he further contended that the rate of exchange to be applied to the moneys due should be as at the dates of maturity of the instruments, and not, as the respondent alleged, at the actual dates of payment. There had been considerable changes in the rates of exchange of Turkish gold pounds into the currency of Palestine. At the dates of maturity the rate stood at £P.0.875 mils in Palestine currency to the Turkish gold pound. At the dates of the actual payments made on account of the debt between August, 1934, and September, 1937, the rates fluctuated between £P.1.485 and £P.1.510 to the Turkish gold pound. There was thus a considerable difference in the balance due on the notes according as the dates of maturity were taken on the one hand or the dates of actual payment on the other. The payment actually made was made in the currency of Palestine, and totalled in that currency £P.1780, which sum, deducted from £P.2052, the equivalent of 2347 Turkish gold pounds exchanged at the rate of £P.0.875 to the Turkish gold pound, left due and owing £P.272.375, which the appellant paid into court. On the other hand, the respondent claimed that the original debt of 2347 Turkish gold pounds had been only reduced by the payments on account, which were brought in as totalling 1206.500 Turkish gold pounds if the actual payments which were made in the currency of Palestine were exchanged into Turkish gold pounds at the rates actually ruling at the several dates of those payments. The respondent, accordingly, claimed that there was still owing a balance of 1140.500 Turkish gold pounds, which represented a debt of £P.1722.155 if exchanged at the date of the claim, at the then local currency equivalent of the Turkish gold pound, which was £P.1.510 to the Turkish gold pound. The Supreme Court (Rose, Frumkin and Khayat JJ.), affirming the District Court, held that the instruments were promissory notes and that interest was payable from the dates of maturity, but not beyond the date of the adjudication in bankruptcy. The court further held that the dates of payment of the notes were the dates at which the exchange was to be taken. Any claim for interest under art. 305 of the Code was reserved for further decision in Palestine and was not now before the Board.

1943. Mar. 15. *T. F. Davis* for the appellant. The documents sued on are not promissory notes, but undertakings to deliver Turkish gold pounds which were not at any material time currency in Palestine, and must, therefore, be regarded merely as a commodity. The documents were drawn in Palestine and payable in Palestine. Sect. 84, sub-s. 1, of the Palestine Bills of Exchange Ordinance, 1929 (1), defines a promissory note as a promise to pay "a sum certain in money," which means legal tender currency and not a promise to deliver a commodity. In any case, the proper rate of exchange at which the conversion of Turkish gold pounds into Palestine currency should be calculated is that prevailing at the date when payment was due and not that ruling at the date or dates of payment. The Supreme Court held that the English authorities established that in English law the conversion must be made at the rate of exchange prevailing at the date of maturity of the debt. That court held further, however, that as far as Palestine authorities were concerned "since, "at any rate, 1932," the balance of authority was the other

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way, and they followed the Palestine authorities to the effect that the conversion should be at the rate of exchange ruling at the date of payment. It is submitted that, by reason of s. 46 of the Palestine Order in Council, 1922 (Laws of Palestine, 1933, vol. iii., p. 2580), in the absence of any authorities except the Palestine decisions since 1932, the English law in this matter should be applied. Also s. 72, sub-s. 4, of the Palestine Bills of Exchange Ordinance, 1929 (1), which is almost identical with s. 72, sub-s. 4, of the English Bills of Exchange Act, 1882, supports that view. [Reference was made to *Apostolic Throne of St. Jacob* v. *Said* (2), and *Daniel* v. *Chief Execution Officer, Jerusalem* (3).] Consequently, whether the documents sued on are promissory notes or only undertakings the rate of exchange should be calculated as at the rate prevailing at the date of maturity of the debt.

The respondent did not appear.

May 4. The judgment of their Lordships was delivered by Lord Wright, who stated the facts, and continued: The judgments under appeal accept the respondent's contentions, and, apparently, accept her figures of claim, though no definite sum is stated in the judgments. It may be, however, that the precise figures were left for subsequent ascertainment, like the figures of interest due up to the date of adjudication, but since their Lordships, for reasons which will appear later, do not agree with the view of the Supreme Court that the relevant dates for the exchange are the dates of actual payment, but are of opinion that the proper dates are the dates of maturity of the instruments, they see no reason to differ from the figures put forward by the appellant. These first state the amounts of the debts exchanged into Palestine currency at a rate which, apparently, is not disputed if the appellant is correct in taking the dates of maturity of the instruments as the basic dates. From this figure of total debt in terms of Palestine currency, the payments made and accepted in Palestine currency have been deducted, leaving the balance admitted to be due in the same currency.

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(1) By s. 72, sub-s. 4, of the Palestine Bills of Exchange Ordinance, 1929: "Where a bill is "drawn out of but payable in "Palestine, and the sum payable "is not expressed in the currency "of Palestine, the amount shall, "in the absence of some express "stipulation, be calculated according to the rate of exchange for "sight drafts at the place of "payment on the day the bill is "payable." By s. 84, sub-s. 1: "A promissory note is an unconditional promise in writing "made by one person to another "signed by the maker, engaging "to pay on demand or at a fixed "or determinable future time a "sum certain in money to, or to "the order of, a specified person "or to bearer."

By art. 145 of the Ottoman Commercial Code: "A promissory "note shall be dated. It shall "specify the amount to be paid, "the name of the person to whose "order it is payable, the time "when it must be paid, and "whether the value thereof has "been received in cash, in goods, "in account, or by the transfer "of a debt."

(2) (1939) 6 Pal. L. R. 528.

(3) (1939) 6 Pal. L. R. 65.

Their Lordships will deal with the questions of principle which arise on the judgments appealed from. On the first question, whether the instruments in suit were promissory notes or undertakings to purchase a commodity, that is, either gold or Turkish notes taken at their gold value, their Lordships agree with the judgments of the courts below. The form of the instruments is obviously that of promissory notes. What seems to be relied on by the appellant is the description of the subject-matter of the obligation as "gold "Turkish pounds." It is contended that Turkish gold coins are not currency in Palestine, but it is clear that they are currency in Turkey and Syria where the respondent was resident. Syria was at the material times a former Turkish territory mandated to the French. A promise to pay a sum expressed in Turkish money, made in Palestine, is not outside any of the recognized definitions of a promissory note. It is a promise to pay in a currency, even though it is not that of the country where the note is made or payable. It is very common to have bills of exchange in a currency foreign as regards one of the parties or as regards the place where the bills are issued or payable. Generally in that case one of the parties is in the country in which the stipulated unit of account (such as pound or dollar) is in current use, and the payment is to be made in that country. It is true that in proceedings to enforce payment, the debt, being expressed in foreign currency, must be translated into the corresponding amount of the local currency if judgment is to issue, but all the same the promise is a promise to pay money. What is peculiar here is that the note is both made and payable in Palestine, so as to make it appear strange that Turkish currency is chosen, but then the payee is resident in Syria where the unit of account in use is Turkish. In their Lordships' judgment the three instruments are promissory notes.

Nor were the notes any the less negotiable instruments

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because of the word "gold." That word does not here import an obligation to deliver gold or pay in gold. What it does is to import a special standard or measure of value. This special measure of value may be described sufficiently, though not with precise accuracy, as being the value which the specified unit of account would have if the currency was on a gold basis. It is equivalent to a gold clause. "Such clauses" were said by Lord Maugham in *Rex* v. *International Trustee for the Protection of Bondholders Aktiengesellschaft* (1) to have been "intended to afford a definite standard or measure of "value, and thus to protect against a depreciation of the "currency and against the discharge of the obligation by a "payment of lesser value than that prescribed." Gold clauses were discussed and explained by the House of Lords in the opinion delivered by Lord Russell of Killowen in *Feist* v. *Société Intercommunale Belge d'Electricité* (2). Such clauses often specify a standard of value based on a particular weight and fineness of gold. In this case it is taken without objection that the Turkish gold pound has an established value. The distinction between the Turkish pound and the Turkish gold pound was illustrated in *Ottoman Bank of Nicosia* v. *Chakarian* (3). In that case a contract which included an obligation to pay in Turkish pounds had been made at a time when Turkey was on the gold standard. Before the date when payment became due Turkey went off gold and the pound depreciated. It was held that the payee was only entitled to be paid at the depreciated rate, and could not claim to be paid in gold pounds, that is, in undepreciated currency.

In their Lordships' opinion, the courts in Palestine were right in holding that the three instruments were promissory notes whether the definition applied is that contained in art. 145 of the Ottoman Commercial Code or in the Bills of Exchange Ordinance, 1929, s. 84, sub-s. 1, which corresponds with s. 83, sub-s. 1, of the English Bills of Exchange Act, 1882, in particular, because the notes were unconditional promises to pay a sum certain in money. Their Lordships think that the appeal fails on this issue, and the respondent is, therefore, entitled to interest from the date of maturity, although the interest will not run beyond the date of adjudication.

There remains the more serious question: At what dates must the rate of exchange be calculated? There can, their Lordships apprehend, be now no doubt as to the English law on this point. It is true that different views have been taken at different times and by different systems of law. Indeed, there are at least four different rules which might be adopted. The rate of exchange might be determined as at the date at which payment was due, or at the date of actual payment, or at the date of the commencement of proceedings to enforce payment, or at the date of judgment. English law has adopted the first rule, not only in regard to obligations to pay a sum certain at a particular date, but also in regard to obligations the breach of which sounds in damages, as for an ordinary breach of contract, and also in regard to the satisfaction of damages for a wrongful act or tort. The general principles on which that rule has been based are explained by the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Co.* (1), a case of an ordinary breach of contract. The rule, however, was established many years before then. It was again enunciated by the House of Lords in *s.s. Celia* v. *s.s. Volturno* (2), where the claim was for damages in tort consequent on a collision. It was there contended that the date of the judgment was the proper date for translating the Italian currency in which the damages were assessed into English currency capable of being put into the judgment of an English court, and some reference was made to different views expressed in the United States. Lord Sumner, however, holding that the date when the obligation accrued was the date of the breach and that it was at that date that the exchange was to be taken, said (3): "The agreed numbers of "lire are only part of the foreign language in which the court "is informed of the damage sustained, and, like the rest of the "foreign evidence, must be translated into English. Being a "part of the description and definition of the damage, this "evidence as to lire must be understood with reference to the "time when the damage accrues, which it is used to describe." This can be applied directly to a case where the damage claimed arises from failure to pay a sum in foreign currency, like the Turkish gold pounds here. It is true that Lord Sumner does not deal specifically with, and seems to reserve, the question of what is the rule where there is a contractual obligation for the payment of fixed or calculable sums in a

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(1) [1937] A. C. 500, 562.
(2) [1934] A. C. 161.
(3) [1938] A. C. 260.

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(1) [1920] 3 K. B. 409.
(2) [1921] 2 A. C. 544.
(3) Ibid. 555.

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foreign place and [their Lordships would prefer "or"] in a local currency. He does, however, observe that: "Waiting "to convert the currency till the date of judgment only adds "the uncertainty of exchange to the uncertainty of the law's "delays" (1). Lord Buckmaster rejects summarily the idea that the date of the writ or of the commencement of the action is the proper date (2). His view, in their Lordships' opinion, is summed up by his statement that in regard to damages which have been "assessed in a foreign currency, "the judgment here, which must be expressed in sterling, "must be based on the amount required to convert this "currency into sterling at the date when the measure was "properly made, and the subsequent fluctuation of exchange, "one way or the other, ought not to be taken into account" (3). In the case of bills of exchange (which include promissory notes) the English Bills of Exchange Act, 1882, by s. 72, sub-s. 4, enacts that the amount of the foreign currency is to be translated into United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable. The Act was a codifying Act and purported, not to change the law, but to declare it, and the Palestine Ordinance expressly states that it declares the law. It is true that the Act and ordinance state the rule as being applicable to bills drawn out of, but payable in, the United Kingdom or Palestine, as the case may be, but not expressed in the currency of the United Kingdom or Palestine, but their Lordships think that the essence of the rule applies in a case where the sum is not expressed in the United Kingdom or Palestine currency and is payable in the United Kingdom or Palestine. Their Lordships, accordingly, consider the ordinance to involve an authoritative declaration of the proper rule to apply to the calculation of the exchange in a case like this. Nor do their Lordships think it necessary to consider whether the ordinance (see s. 72, sub-s. 4) applies to all the three notes or only to the notes which matured before the date of the ordinance. The ordinance only declares what the English rule is, and, as it is, so it has been for many years.

The reason why the Supreme Court refused to apply the English rule and, instead, held that the dates of actual payment were to be adopted in converting the currency was that the decisions of the courts in Palestine bound them to adopt the latter principle. The Supreme Court, while not contesting what the English rule was, added "As far as Palestine is "concerned, however, as the learned President [of the District "Court] pointed out in his long and careful judgment, the "balance of authority is the other way." What the President had said was: "we must treat the decisions of the Supreme "Court of this country as part of the law of Palestine and "binding on us, unless or until the principles laid down by "such decisions have been varied or changed by legislation "or the opinions of the Privy Council." Their Lordships agree with this view, and must determine what should be, or more precisely, is, the rule in Palestine. The Supreme Court held that in Palestine the principle that the exchange should be taken as at the date of actual payment had been established "since at any rate 1932," but the court does not quote any authority except the Palestine decisions, which do, indeed, in the words of the court "lay down the proposition "that, in an action on a promissory note, the conversion into "Palestine currency should be at the rate of exchange pre-"vailing at the actual date of payment." These decisions were *Ahmad Hassan Abu Laban* v. *Bergman* (1), *Abu Labban* v. *Lieder & Fisher* (2), and an unreported decision of the Supreme Court, No. 79 of 1936. The Supreme Court also refer to *Apostolic Throne of St. Jacob* v. *Saba Said* (3), decided in 1939 by this Board, where the issue was whether the bond was or was not a gold bond. It appears from the headnote to the report that the courts in Palestine had taken the rate of exchange as at the date of payment, but no issue was raised on this point before this Board, and the judgment shows that it was not considered by the Board. The case cannot be regarded as a decision of the Board on this point.

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(1) [1921] 2 A. C. 544, 558.
(2) Ibid. 548.
(3) Ibid. 549.

Their Lordships, accordingly, have now to decide the question as one which is open to their consideration. Their conclusion is that the English rule should prevail in Palestine. Art. 46 of the Palestine Order-in-Council, 1922, must be considered. It was adverted to in a judgment of this Board delivered by Sir George Rankin in *Mamur Awqaf of Jaffa* v. *Government of Palestine* (4), and in an unreported case of *Sheik Suleiman* v. *Michel Habib* (5). In the latter case Lord Atkin,

(1) (1932) 2 Rotenberg, 658.
(2) (1932) Ibid. 664.
(3) (1939) 6 Pal. L. R. 528.
(4) [1940] A. C. 503.
(5) P. C. appeal, No. 1 of 1935.

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delivering the judgment of the Board, observed that under art. 46 the courts in Palestine were to exercise their jurisdiction "in conformity with the substance of the common "law and the doctrines of equity in force in England." This was to be subject to the provisions of the Ottoman law in force in Palestine on November 1, 1914, and certain later Ottoman laws and such orders-in-council and ordinances as were in force in 1922 and are subsequently in force, and to modifications necessarily required by local circumstances. In the present case it is not suggested that there were any provisions of Ottoman law relevant to this point, and no ordinance can be quoted, except the Bills of Exchange Ordinance, to which reference has already been made, and this ordinance, as already pointed out; is in substance contrary to the view taken by the Palestine courts. The order-in-council does not mean that decisions of the Supreme Court, which are subject to appeal to His Majesty in Council, are in themselves authorities to establish finally a rule of law contrary to English law. A rule of law to have this consequence must be one laid down in Imperial Acts or orders-in-council or in ordinances applicable to Palestine, or in the former Ottoman law, that is, in the various Ottoman codes, the Mejelle or other authoritative sources of Ottoman law, so far as not superseded by ordinances of Palestine. As no rule of law is so laid down, their Lordships are, therefore, of opinion that on this issue it should be held to be the law of Palestine that in such a case as the present the correct date for calculating the exchange should be the date of the breach by non-payment, that is, the date of maturity of the bill or note, and not the date of any actual payment. The Board may further observe that the English decisions seem to consider the date of actual payment as one which cannot properly be taken for converting the exchange. One effect of adopting it would be that a judgment or execution under it could not fix a definite sum because until actual payment the rate could not be ascertained. The date of judgment was rejected by the House of Lords in the *s.s. Celia* v. *s.s. Volturno* case (1). To adopt the date of payment would be to place the rate of exchange in the control of the debtor, who could, at his will or convenience, delay payment, and thus benefit, or attempt to benefit, by the fluctuations of exchange. The sum of £P.272.375 paid into court on December 13, 1937, is not

(1) [1921] 2 A. C. 544.

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sufficient to cover interest due from dates of maturity to date of adjudication.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, and the decrees of the courts in Palestine set aside; that the plaintiff should have judgment for £P.2052.375 with interest at 9 per cent. per annum (*a*) on £P.2012.500 from May 23, 1930, to October 27, 1930, and (*b*) on £P.39.875 from October 21, 1929, to October 27, 1930, less a sum of £P.1780 paid on account in the years 1934-1937; this judgment to be without prejudice to any future claim for interest under art. 305 of the code. Liberty to either party to apply to the trial court to withdraw the money paid into court or any part thereof. The appellant must pay the plaintiff's costs of the action. The plaintiff must pay the appellant's costs of the appeal to the Supreme Court and of this appeal.

Solicitors for appellant: *Bulcraig & Davis.*

[HOUSE OF LORDS.]

Applied. JEFFREY v. JEFFREY [1951] P. 32

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AND

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Apr. 2, 5, 6, 8, 9;
June 9.

Referred to. LOWE v. LOWE [1952] P. 376

Divorce — Discretion — Exercise — Review by appellate tribunal — Matrimonial Causes Act, 1937 (1 *Edw.* 8 *&* 1 *Geo.* 6, *c.* 57), *s.* 4.

By s. 4 of the Matrimonial Causes Act, 1937, "the court shall "not be bound to pronounce a decree of divorce and may dismiss "the petition if it finds that the petitioner has during the marriage "been guilty of adultery."

It is impossible to lay down strict rules for the exercise of the discretion created by the section, but the court should have regard to—(*a*) the position and interest of the children of the marriage; (*b*) the interest of the party with whom the petitioner has committed adultery, with special regard to their future marriage; (*c*) the question whether, if the marriage be not dissolved, there is a prospect of reconciliation between the spouses; (*d*) the interest of the petitioner, particularly as regards allowing him to remarry and live respectably; (*e*) the interest of the community

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* *Present:* VISCOUNT SIMON L.C., LORD THANKERTON, LORD MACMILLAN, LORD ROMER, and LORD CLAUSON.

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at large, judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.

An appeal against the exercise of the court's discretion may succeed on the ground that the discretion was exercised on wrong or inadequate materials if it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take relevant matters into account, but the appeal is not from the discretion of the court to the discretion of the appellate tribunal.

When both parties are seeking the exercise of the court's discretion and injustice would be done if it were exercised in favour of one party only, the court may, in cases where it is proper to bring the marriage to an end, pronounce a decree in favour of each.

Decision of the Court of Appeal, [1942] W. N. 215, reversed.

APPEAL from the Court of Appeal.

The appellant, Richard Blunt, and the respondent, Elizabeth Blunt, were married on October 20, 1936. There was one child of the marriage, a son, born on November 16, 1938. The parties lived together till the beginning of 1940 when they separated after the appellant had accused the respondent of adultery. On October 8, 1940, the appellant presented a petition for divorce on the ground of the respondent's adultery, but on September 17, 1941, it was dismissed by consent. On February 2, 1942, the appellant presented a second petition for divorce on the ground of the respondent's adultery with Reginald Farrow, the co-respondent. On February 3 the respondent presented a cross-petition for divorce on the ground of the appellant's cruelty. On May 27 it was ordered that the suits should be consolidated. On June 5 the respondent filed a " discretion statement " admitting adultery with the co-respondent, and on June 8 the appellant filed a " discretion statement " admitting adultery with one Margaret Dean. On June 9 the hearing began before Hodson J. On June 10 the respondent filed a supplemental petition for divorce on the ground of the appellant's adultery with Margaret Dean. In the evidence for the appellant allegations were made against the respondent's moral character. The respondent's evidence alleged (inter alia) coarseness and indecency on the part of the appellant and of jockeys and stableboys employed by him with whom he compelled her to consort despite their drunkenness and ill-behaviour. It was also alleged that he kept her short of money and neglected to pay his bills, including fees

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due to a surgeon and nurses attending their child, so that she was constantly harassed by creditors. It appeared that after the parties had separated they had continued to correspond and to meet from time to time and had had matrimonial relations. On November 26, 1940, after the presentation of the first petition, the respondent wrote a letter to the appellant in the course of which she said: "Please don't be rash in "taking this course which you may perhaps regret all your "life," but in evidence she denied that she intended thereby to ask that they should "go back to the old life together." It also appeared that in the course of certain proceedings in the King's Bench Division the appellant had falsely denied that he had condoned the adultery alleged in the first petition by staying with the respondent at the Cumberland Hotel, London, and elsewhere. Hodson J. gave judgment on June 11. On the issues of fact he found that, although the appellant's behaviour was offensive and unkind, the respondent's allegations of cruelty and of conduct conducing to her adultery were not established. He dismissed her petition and, exercising his discretion in favour of the appellant, granted him a decree nisi. The Court of Appeal (MacKinnon, Goddard and du Parcq L.JJ.) allowed an appeal by the respondent and rescinded the decree in favour of the appellant, but they upheld the refusal of a decree to her. The appellant appealed to the House of Lords and the respondent cross-appealed.

Sir Patrick Hastings K.C. and *Victor Williams* for the appellant. On the facts the judge was right in his exercise of his discretion. Further, an appellate tribunal cannot and should not interfere with that exercise so long as the judge has not misdirected himself by taking into consideration irrelevant or unproved matters or omitting to consider relevant matters: *Apted* v. *Apted and Bliss* (1); *Andrews* v. *Andrews* (2); *Holland* v. *Holland* (3). The exercise of the discretion depends necessarily on the judge's hearing and seeing the people who come before him. In matrimonial matters it is almost impossible to judge the truth between husband and wife without actually seeing them and having an opportunity of appreciating their behaviour. It cannot be that the discretion is given to each court successively whether it has seen the witnesses or not. If that were so, every case might come to

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(1) [1930] P. 246.
(2) [1940] P. 184.
(3) [1918] P. 273, 280.

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the House of Lords on a similar point: see *Charles Osenton & Co.* v. *Johnston* (1). *Evans* v. *Bartlam* (2) has no application here. The Court of Appeal has steadily refused to lay down rules to fetter the exercise of the discretion by the court below. In divorce cases the court would formerly exercise its discretion only (1.) in the case of "innocent" adultery, e.g., where the petitioner, believing the respondent was dead, had married again; (2.) where a wife was compelled by her husband to commit adultery; (3.) in the case of condoned adultery: *Morgan* v. *Morgan* (3). The exercise of the discretion was strictly circumscribed until about 1917, when it became progressively less stringent in its tests: see Rayden on Divorce 4th ed., p. 149. The present practice is the direct antithesis of former practice. Now it is the exception to refuse to exercise the discretion and a decree is granted unless there is good reason for its refusal. The court should consider which spouse was really responsible for breaking up the marriage. In *Wilson* v. *Wilson* (4) four considerations were laid down as proper for the court's attention in deciding whether the discretion should be exercised: (*a*) the interest of the children of the marriage; (*b*) the interest of the party with whom the petitioner has committed adultery, with special regard to the prospect of their future marriage; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of the reconciliation of the spouses; (*d*) the interest of the petitioner, in particular, the interest that the petitioner should be able to remarry and live respectably. These considerations were approved in *Wilkinson* v. *Wilkinson* (5). In the light of this the importance of the concealment of a petitioner's own adultery lies in the fact that the court is not put in full possession of the facts. The interests of all the other persons concerned, which must be considered, shall not be prejudiced by any delay in disclosure. Once it is established that full disclosure has been made and that it is not contrary to public interest to dissolve the marriage, the conduct or lack of candour of the petitioner can have nothing to do with the matter. No court could lay it down as a general rule that public policy is offended unless disclosure be made at a particular time. In the present case the Court of Appeal was not entitled to interfere with the exercise of the judge's

(1) [1942] A. C. 130, 138.
(2) [1937] A. C. 473.
(3) (1869) L. R. 1 P. & D. 644.
(4) [1920] P. 20.
(5) (1921) 37 T. L. R. 835 n.

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discretion: see *Todd* v. *Todd* (1); *Gayer* v. *Gayer* (2); *Wickins* v. *Wickins* (3). In cases of doubt the judge should pronounce a decree. In the present suit the appellant was not guilty of any perjury or attempted deception, but the whole basis of the order of the Court of Appeal was disapproval of the appellant.

Beyfus K.C. and *Holroyd Pearce* for the respondent. The Court of Appeal was right in rescinding the decree pronounced in favour of the appellant since the court should not exercise its discretion in favour of any petitioner who has been guilty of consistent disgraceful behaviour as a husband and has attempted to deceive the court. As regards the cross-petition, the Court of Appeal should have exercised its discretion and pronounced a decree in the respondent's favour. The case should not have been treated in two separate compartments but should have been considered as a whole. The Court of Appeal, having taken a far graver view than the judge of the appellant's conduct, created an entirely different situation by reversing the decision in his favour, and, accordingly, they should have considered the question of the exercise of discretion in favour of the respondent on the basis of the opinion which it had formed of the facts, untrammelled by that of the judge from which it was differing. The duty of the Court of Appeal is to make a decree in accordance with what it would itself regard the right use of the discretion: see *Charles Osenton & Co.* v. *Johnston* (4). In a case like the present the court must weigh the demerits of both sides. The demerit of the respondent consists only of adultery. That of the appellant is far more important. In the past twenty years the courts have tended to regard adultery as more venial than formerly and to regard neglect and ill-treatment, breaches of the marriage duty to love and cherish, as being more grave. On the admitted facts the appellant's conduct to the respondent was so bad that, whether or not it amounted technically to cruelty, it must weigh heavily in favour of the respondent on the question of discretion. The cases in which a decree has been granted to a petitioner in spite of deliberate deception on his part are rare. *Wilson* v. *Wilson* (5) was not a case of deception. [They also referred to *Stuart* v. *Stuart* (6); *Wilkinson* v. *Wilkinson* (7); *Apted*

(1) (1907) 24 T. L. R. 28.
(2) [1917] P. 64, 73.
(3) [1918] P. 265.
(4) [1942] A. C. 130, 138.
(5) [1920] P. 20, 21.
(6) [1930] P. 77.
(7) 37 T. L. R. 835 n.

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v. *Apted and Bliss* (1); and *Bainbridge* v. *Bainbridge* (2).] Not only were the demerits of the appellant greater than those of the respondent, but also in discretion cases a wife is treated by the courts more leniently than a husband. It is desirable that this marriage should be dissolved and, there being a cross-petition, the court is not confined to the alternatives of granting or refusing a decree to the petitioner. It may grant a decree to either party or to both: see *G.* v. *G.* (3). Although for a woman there is a special advantage in obtaining a decree rather than in being divorced, the respondent, while submitting that she should be granted a decree, would prefer that a decree should be granted to the appellant rather than that the marriage should be not dissolved.

The House allowed the appeal and dismissed the cross-appeal, thus restoring the order of Hodson J., and reserved the statement of its reasons to a later day.

June 9. VISCOUNT SIMON L.C. My Lords, at the conclusion of the oral arguments in this case, the House intimated its unanimous view that the appeal should be allowed, and reserved to a later day the statement of its reasons for that conclusion. These reasons I now proceed to state. I have had the great advantage of the co-operation of the other members of the House in preparing this opinion and I understand that they concur in it.

This appeal concerns the exercise of the so-called "discretion" of the divorce court to grant a decree of divorce notwithstanding that the petitioner has been guilty of adultery. Appeals from the divorce court on this issue are rare. There are apparently only three previous cases in the reports, in each of which the Court of Appeal confirmed the view of the trial judge and upheld his refusal to exercise this discretion: *Todd* v. *Todd* (4); *Wickins* v. *Wickins* (5); and *Holland* v. *Holland* (6). In the present case the Court of Appeal (MacKinnon, Goddard and du Parcq L.JJ.) has reversed the decision of the trial judge, Hodson J., who exercised his discretion in favour of the appellant (the husband) and granted to him a decree on the ground of his wife's (the respondent's) adultery, notwithstanding that the appellant admitted that he also had committed adultery. From this conclusion both

(1) [1930] P. 246.
(2) [1934] P. 66.
(3) [1912] P. 173.
(4) 24 T. L. R. 28.
(5) [1918] P. 265.
(6) [1918] P. 273.

parties appeal, the wife also asking for the discretion to be exercised in her favour. There thus comes before this House for the first time, eighty-six years after the passing of the Matrimonial Causes Act, 1857, the important question of the nature and proper exercise of the discretion which was originally conferred on the divorce court by the proviso to s. 31 of that Act.

Hodson J. had before him a consolidated suit between the appellant and respondent, each spouse petitioning for dissolution of the marriage on the ground of the other's adultery, and each spouse lodging a "discretion statement," under r. 28 of the Matrimonial Causes Rules, 1937, which admitted that spouse's adultery and asked for the exercise of the court's discretion in his or her favour respectively. There is one child of the marriage. The respondent in her original petition had asked for the marriage to be dissolved on the ground of her husband's cruelty, to which the ground of his adultery was added by supplemental petition. The learned judge came to the conclusion that there was not the slightest indication of any cruelty on which a divorce could be founded. In this situation, when the respective charges of adultery have been proved (assuming there has been no condonation, connivance, or collusion) any one of four results is conceivable—(1.) The court may exercise its discretion by pronouncing a decree of dissolution of marriage in the husband's favour, while dismissing the wife's petition. (2.) The court may exercise its discretion by pronouncing a decree in the wife's favour, while dismissing the husband's petition. (3.) The court may refuse to exercise its discretion in favour of either party, whereupon both petitions will be dismissed and the marriage remains undissolved. (4.) Theoretically (though this practice has been almost unknown in connexion with cross charges of adultery), the court might exercise its discretion in respect of both parties and pronounce the decree in favour of each party. I propose to make some observations later in this opinion as to the use of this last course. In the present case, Hodson J. adopted course (1.). The Court of Appeal has reversed this and substituted course (3.). Both parties appeal, the appellant seeking to restore the trial judge's decision and the respondent arguing for course (2.) or even course (4.).

The statutory enactment endowing the divorce court with "discretion" in these cases is now to be found in s. 4 of the

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Matrimonial Causes Act, 1937, where the mandatory requirement that the court shall pronounce a decree of divorce if satisfied on the evidence that the case for the petitioner has been proved and that there has been no condonation, connivance or collusion is followed by a proviso that "the court "shall not be bound to pronounce a decree of divorce and "may dismiss the petition if it finds that the petitioner has "during the marriage been guilty of adultery." A provision to the like effect has been part of the statute law of divorce ever since the Matrimonial Causes Act, 1857. Previously, the ecclesiastical courts had maintained the rule that a party seeking relief must come with clean hands: see the exposition of this topic in *Otway* v. *Otway* (1), though condoned adultery was not regarded as a bar to divorce a mensa et thoro or to a judicial separation: *Anichini* v. *Anichini* (2). For many years after 1857 the cases in which the court exercised its discretion to grant a decree were strictly circumscribed. Lord Penzance in *Morgan* v. *Morgan* (3) mentioned certain examples: (1.) cases like *Joseph* v. *Joseph and Wenzell* (4) where the respondent had induced the petitioner to believe that she was dead and the petitioner in this belief had married again; (2.) *Coleman* v. *Coleman* (5), in which the petitioner satisfied the court that her husband had compelled her to live a life of prostitution; and (3.) possibly, cases in which an act of adultery of the husband had been condoned by the wife and in no way conduced to her subsequent misconduct. This last would be following the rule that had prevailed in the ecclesiastical courts. Lord Penzance added (3) that there probably were other classes of case which called for a favourable exercise of the court's powers, but he deprecated (6) "a loose "and unfettered discretion" exercised as "a free option "subordinated to no rules," and added that "the duty of "reducing its exercise to method devolves upon the court."

The scope within which the divorce court has thought it right to exercise a favourable discretion has been greatly widened since Lord Penzance's pronouncement, and in contrast with his view it has for long been the practice to regard the discretion as "unfettered." It is impossible to lay down strict rules for its exercise, and to attempt to do so would really be to restrict the liberty conferred by the language of

(1) (1888) 13 P. D. 141.
(2) (1839) 2 Curt. 210.
(3) (1869) L. R. 1 P. & D. 644, 646.
(4) (1865) 34 L. J. (P.M. & A.) 96.
(5) (1866) L. R. 1 P. & D. 81.
(6) L. R. 1 P. & D. 644, 647.

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the statute. I would adopt the view of the Court of Appeal, expressed a quarter of a century ago, that "where Parliament "has invested the court with a discretion which has to be "exercised in an almost inexhaustible variety of delicate "and difficult circumstances, and where Parliament has not "thought fit to define or specify any cases or classes of cases "fit for its application, this court ought not to limit or restrict "that discretion by laying down rules within which alone "the discretion is to be exercised, or to place greater fetters "upon the judge of the Divorce Division than the legislature "has thought fit to impose": *Wickins* v. *Wickins* per Swinfen Eady M.R. (1). The utmost that can be properly done is to indicate the chief considerations which ought to be weighed in appropriate cases, as helping to arrive at a just conclusion. In *Wilson* v. *Wilson* (2) Duke P., in dealing with the particular case before him, mentioned four circumstances which, in his view, warranted the exercise of the judicial discretion in the petitioner's favour, and these four considerations were referred to with approval by Lord Birkenhead L.C. when he was sitting in the divorce court and deciding *Wilkinson* v. *Wilkinson* (3). These four points are: (*a*) the position and interest of any children of the marriage; (*b*) the interest of the party with whom the petitioner has been guilty of misconduct, with special regard to the prospect of their future marriage; (*c*) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (*d*) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to remarry and live respectably. To these four considerations I would add a fifth of a more general character, which must, indeed, be regarded as of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused. It is to be observed that in the case last quoted divorce was decreed notwithstanding that the petitioner's misconduct was only disclosed after the King's Proctor had intervened, and this was also the fact in *Wilson* v. *Wilson* (1), and in other cases. Nevertheless, it is important to emphasize, as Lord Birkenhead said in *Wilkinson* v. *Wilkinson* (2) that: "It is "the duty of every petitioner in this court to place the facts "of his or her case most fully before the court; and the "wholesome and well-established rule, that on the intervention "of the King's Proctor a decree may be rescinded, if there is a "failure to deal with the court with the utmost good faith, "is one that is not to be relaxed." Some years later, the exercise of the discretionary power of the divorce court to grant a decree notwithstanding the petitioner's adultery was the subject of elaborate consideration by Lord Merrivale P. in *Apted* v. *Apted and Bliss* (3) when previous decisions and judicial pronouncements were carefully reviewed. Lord Merrivale rejected as a practical impossibility any precise formulation of the grounds on which discretion is to be exercised. He pointed out (4), however, that "a judicial "discretion cannot be rightly exercised except upon due "ascertainment of the relevant facts, and every interest "involved is a proper matter for consideration. Upon these "facts a judgment is to be formed in accordance with a "statutory duty. When the court has used its authority "to secure knowledge of the material facts, and a decree "is pronounced upon due presentment of them, it must I "think be assumed to be a decree based on the statutory "requirements."

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(1) [1918] P. 265, 272.
(2) [1920] P. 20, 21, 22.
(3) 37 T. L. R. 835 n.

This brings me to a consideration of the circumstances in which an appeal may be successfully brought against the exercise of the divorce court's discretion. If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials, but, as was recently pointed out in this House in another connexion in *Charles Osenton* v. *Johnston* (5): "The appellate tribunal is not at liberty merely to substitute "its own exercise of discretion for the discretion already

(1) [1920] P. 20.
(2) 37 T. L. R. 835 n.
(3) [1930] P. 246.
(4) Ibid. 255, 256.
(5) [1942] A. C. 130, 138.

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"exercised by the judge. In other words, appellate authorities "ought not to reverse the order merely because they would "themselves have exercised the original discretion, had it "attached to them, in a different way. But if the appellate "tribunal reaches the clear conclusion that there has been a "wrongful exercise of discretion in that no weight, or no "sufficient weight, has been given to relevant considerations ". . . . then the reversal of the order on appeal may be justified." *Osenton's* case was one in which the discretion being exercised was that of deciding whether an action should be tried by an official referee, and the material for forming a conclusion was entirely documentary and was thus equally available to the appellate court. The reason for not interfering, save in the most extreme cases, with the judge's decision under s. 4 of the Matrimonial Causes Act, 1937, is of a far stronger character, for the proper exercise of the discretion in such a matter largely depends on the observation of witnesses and on a deduction as to matrimonial relations and future prospects which can best be made at the trial. In *Holland* v. *Holland* (1) Swinfen Eady M.R. defined the only issue that can be raised in the Court of Appeal in challenge of the exercise of the divorce judge's discretion thus: "The question for con"sideration by this court is whether his judgment is erroneous, "and not whether we should have exercised the discretion in "the same manner as the judge below did. There is no appeal "from his discretion to our discretion, and the appellant is "not entitled to succeed unless the judgment is erroneous."

I now turn to the judgments pronounced in the Court of Appeal. They deserve, and they have received, the most careful study, especially as the three lords justices all reached the same conclusion, though not, I think, entirely on the same grounds. MacKinnon L.J. was obviously deeply impressed by the deplorable behaviour of the appellant husband towards his wife during the period when they were living together. The lord justice, while accepting Hodson J.'s findings in the appellant's favour on the issues of cruelty and of conduct conducing to the wife's adultery, said (and I am not disposed to differ from him): "His conduct to his wife "was certainly proved to have been very bad. He compelled "her to consort with drunken stableboys and affronted her "by his and their coarseness and indecencies. The incidents "about money, including his refusal to pay a surgeon and

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(1) [1918] P. 273, 280.

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"nurses attendant on his infant son, are shocking. In short, "he behaved as a cad." It is necessary to add that the lord justice's conclusion as to the moral character of the wife was even more condemnatory, but it is difficult to see how the bad behaviour of the husband deprived the learned judge of the right to weigh such considerations as I have set out above as bearing on the exercise of his discretion. For example, how can the judge's duty to consider the interests of the child of the marriage be affected thereby? Moreover, with all respect to the learned lord justice, his view seems to have been coloured by some misconception of the facts. The husband's admission of his own adultery was not made "on the "third and last day of the hearing." On the contrary, it was stated to the court by his counsel in his opening speech. The admission that he had condoned the wife's earlier misconduct, as to which he had sworn falsely in a previous King's Bench action, was not "dragged" from the appellant in the course of the divorce suit, but was stated when he gave evidence, though he at first suggested false excuses for his previous falsehood. It is a mistake to suppose that the appellant attempted to deceive the divorce court about this condonation. The discreditable fact is that he committed perjury about it in the previous action. Goddard L.J. based his judgment on a proposition which I accept and which he formulated as follows: "That this discretion is one with "which this court should be slow to interfere is unquestionable, "but if it is of opinion that the judge has proceeded on wrong "grounds or has not taken into account facts which ought "to have been considered, this court not only can, but ought "to, substitute its view for that of the judge below." My difficulty, however, is that after a most careful study of the learned lord justice's judgment as a whole, I cannot discover what were the wrong grounds or what were the facts not taken into account. We asked counsel for the respondent to point out the facts which it was considered that the judge had not taken into account, and he was unable to give us satisfaction on this head. One particular incident referred to by Goddard L.J.—that relating to the Cumberland Hotel—was, I think, manifestly included in Hodson J.'s review of the facts, and, in any case, it would be rash to assume that a judge of his experience has failed to take into account a relevant fact merely because at the end of the three days' trial he does not make specific mention of it in his judgment.

As regards the grounds upon which a favourable discretion can be exercised, Goddard L.J. was careful to emphasize that the discretion "must be unfettered," and he added: "But there is "one rule which must obviously obtain, and that is the duty of "disclosure, full and frank, for without it the court has not the "material upon which it can form an opinion whether relief "should be granted or not. Such insistence has been laid, and "rightly so, on the duty of disclosure that there is some danger "that it may come to be regarded as the only material matter. "The public's interest has to be considered in all its aspects, and "not only from the point of view that it is undesirable, as it "surely is, to keep two adulterous spouses fettered in the "bonds of wedlock." I am in full agreement with this pronouncement, but I venture to think that the learned lord justice did not apply it correctly to the facts of the present case. Goddard L.J. continued: "The law requires the "sanction of the court for the dissolution of a marriage, and "if people deliberately set out to deceive the court, even if "the truth be wrung from them at the last moment, surely "that is a most material fact in considering whether discretionary relief should be given. It is here that I feel "compelled to differ from Hodson J. He said that the "important matter for his consideration was whether in "the end he had got the truth of the matter from the petitioner. "That looks to me very much like saying that, if disclosure "is somehow obtained, nothing else matters very much." I cannot agree with this criticism of Hodson J.'s judgment. It seems to me clear that the learned judge took into consideration the appellant's conduct in relation to the court, but the learned judge came to the conclusion that he had finally succeeded in ascertaining the relevant facts, including the facts as to the appellant's attempts at deception, and that on the sum total of those facts he ought to exercise his discretion in the appellant's favour. The learned judge's reference to the importance of getting at the truth of the matter does not justify an inference that he had erroneously failed to pay due regard to the appellant's earlier attempts at deception. The weight to be given to the appellant's misconduct in that respect was a matter to be determined by the learned judge, and I can find nothing to enable me to reach the conclusion, which Goddard L.J. would seem to have reached, that there was some misconception in the judge's mind which would justify an appellate court in treating the learned judge's conclusion in regard to this matter as "erroneous" within the meaning of that word as used by Swinfen Eady M.R. in *Holland* v. *Holland* (1). du Parcq L.J. fully recognized that discretion in these cases is "at large," but he was plainly influenced in his conclusion by the circumstance that he personally took a more favourable view of the wife's conduct than of the husband's. With the greatest respect, I cannot but think that, even if this were a legitimate ground for reversing on appeal the decision of the trial judge (which, in my opinion, it was not), it was a conclusion resting, to a material extent, on a misreading of the facts; for example, the lord justice says of the husband: "He perjured himself "with a view to perverting the course of justice in the very "proceedings in which he is craving the indulgence of the "court." I have already pointed out that the perjury did not occur in the divorce court at all. Again, the lord justice interpreted a phrase in a letter written by the wife to her husband as showing that "the wife gave her husband a real "opportunity of reconciliation, which he made no effort to "grasp"; but, in so saying, the lord justice omitted to observe that the wife in answer to her own counsel repudiated this interpretation and said of this very letter that she did not intend to "go back to the old life together."

Having regard to the considerations which should govern the exercise of the judge's discretion in the divorce court and to the principles which limit any review of the exercise of that discretion in an appellate tribunal, this House has come to the conclusion that Hodson J.'s decision should have been allowed to stand, and must be restored by order of this House.

Before parting with the case, I desire to add some observations on the use, in appropriate cases, of the course numbered (4.) at the beginning of this opinion, the course, namely, which is open to the court, when both parties have committed adultery, of exercising its discretion in favour of both sides and pronouncing a decree on that basis. In the present case, that course would not be proper, for the learned judge has declined to exercise his discretion in favour of the wife and the members of the Court of Appeal all support him in this decision, though du Parcq L.J. did not himself approve of the learned judge's conclusion that it was the conduct of the wife which broke up the matrimonial home. If it were

(1) [1918] P. 273, 280.

permissible to review such a finding of fact, I should certainly agree with Hodson J. Speaking, however, more generally, it appears to me that cases may not infrequently arise in which each party, while proving the case for his or her petition, has been guilty of such conduct as by the terms of the statute entitles the court to dismiss the petition, where injustice may be done if discretion is exercised in favour of one of the parties only. There is no reason in principle why, where both sides are in mercy, if the judge decides to exercise his discretion, he should not exercise it in favour of both parties and pronounce the decree without drawing a distinction between them. If, for example, the blame for the breakdown of the marriage must be equally shared and the circumstances are such as do not justify a judicial preference for one party as compared with the other, serious injustice may be done if a decree of divorce is pronounced in favour of one party while the petition of the other party is dismissed. Under s. 190, sub-s. 1, of the Supreme Court of Judicature (Consolidation) Act, 1925, the court in fixing, on any decree for divorce, what payment is to be secured by the husband to the wife is to have regard "to the conduct of the parties," and the wife may be unduly favoured, or unduly handicapped, if the judge, in a case where there is little to choose between the parties, only pronounces a decree in favour of one spouse. There is, of course, the alternative of refusing the exercise of discretion to either side, but where the judge decides that it is his duty to exercise his discretion and thus bring the marriage to an end, the method of doing so just referred to should, in proper instances, not be overlooked.

The order of the House, which has already been made, therefore, is that the appeal should be allowed and the order of Hodson J. restored. The cross-appeal is dismissed. As regards costs, there will be no costs in the Court of Appeal and each party will pay his or her own costs in this House. The appellant not objecting, the respondent may take her costs in this House out of the 300*l*. provided by him under the order of the Court of Appeal, any balance to be returned to the appellant.

LORD THANKERTON. My Lords, I concur.

LORD ROMER. My Lords, I also concur.

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LORD CLAUSON. My Lords, I also concur. My noble and learned friend Lord Macmillan, who is unable to be present to-day, asks me to say that he also concurs.

Appeal allowed.

Solicitors for appellant: *Tamplin, Joseph & Flux.*
Solicitors for respondent: *Kenneth Brown, Baker, Baker.*

[PRIVY COUNCIL.]

J. C.*
1943
June 24.

HANNA EISSA KAWAS . . . . . . APPELLANT;
AND
BISHARA ELIAS KAWAS AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF PALESTINE.

Palestine—Court of Christian community—Consensual jurisdiction in matters of personal status—Guardianship of minors—Need of consent of all interested parties—Application for appointment of guardian—" Suit " or " action "—Palestine Order in Council, 1922, *ss.* 43, 51, 54 (i.) (ii.).

Where a consensual jurisdiction requires for its constitution the consent of " all the parties," the consent of all whose interests are concerned in the proceedings is necessary, and absence of consent, whether due to unwillingness or inability to consent, is equally fatal to the exercise of the jurisdiction. Where, therefore, a widow had applied to the Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem, to be appointed guardian of her two minor sons, that court, which under art. 54 (ii.) of the Palestine Order in Council, 1922, has jurisdiction in matters of personal status—which by art. 51 of the Order in Council includes suits regarding guardianship—of members of the particular community " where all the parties to the action consent to their " jurisdiction," had, assuming that an application for the appointment of guardians is a suit or action within the meaning of arts. 51 and 54 of the Order in Council, no jurisdiction to grant a certificate of guardianship because the minors did not, and could not, consent to their jurisdiction:—

Held, further, that if the application for the appointment as guardian did not fall within art. 54 (ii.) of the Order in Council as not being a suit or action, there was no provision in the Order conferring jurisdiction on the ecclesiastical court to entertain the application, which would then require to be made to the Supreme Court of Palestine which, by art. 43 of the Order, has "jurisdiction "to hear and determine such matters as are not causes or trials, "but petitions or applications not within the jurisdiction of any "other court and necessary to be decided for the administration "of justice."

**Present:* LORD MACMILLAN, LORD PORTER, LORD CLAUSON, SIR GEORGE RANKIN, and SIR MADHAVAN NAIR.

Judgment of the Supreme Court of Palestine affirmed.

APPEAL (No. 41 of 1942) from a judgment of the Supreme Court of Palestine, sitting as a court of appeal (July 31, 1940), affirming a judgment of the District Court of Jerusalem (February 9, 1940).

The following facts are taken from the judgment of the Judicial Committee: This was an appeal by the defendant in an action against him by the widow and two sons of his deceased brother in which they claimed from the defendant an account of the transactions of a business carried on in Honduras by the defendant in partnership with the deceased and another brother whose share was acquired by the defendant. Payment was also claimed of the deceased's share in the partnership assets as the same might be ascertained from the accounts. The case was contested by the defendant on various grounds, but the only defence with which the Board were now concerned was founded on an agreement, dated March 10, 1925, made between the appellant, of the first part, and one Shaheen and the deceased's widow, of the second part, in which the second parties were described as the legal guardians of the deceased's two sons, then in minority, "by "virtue of a legal certificate of guardianship emanating from "the Ecclesiastical Orthodox Court of Jerusalem." By that document it was agreed that the share of the widow in the partnership assets amounted to 250*l*., and that of the two minor children to 1750*l*. The agreement contained provisions relating to the manner of payment of those sums, and the widow appeared to have received certain sums in pursuance of it. The District Court and, on appeal, the Supreme Court (Trusted C.J., Frumkin and Rose JJ.), in a judgment delivered by Rose J., founding on arts. 51 and 54 (ii.) (1) of the Palestine

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(1) Article 54 of the Palestine Order in Council, 1922, provides: "The courts of the several "Christian communities shall "have:—(i.) Exclusive jurisdiction "in matters of marriage and "divorce, alimony, and confirma-"tion of wills of members of "their community other than "foreigners as defined in art. 59.

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Order in Council, 1922, held that the appointment of Shaheen and the deceased's widow as guardians of the two sons of the deceased was invalid for want of consent by the minor children, and, consequently, that the agreement which they made as such guardians with the appellant was of no avail to him as a defence except in so far as it concerned sums received by the widow on her own account. Having thus disposed of the obstacle interposed by the existence of the agreement of 1925, the courts below fixed the share of the deceased in the partnership on his death in 1922 at $24,500, on which sum they allowed interest at six per cent. to the date in 1927 when the partnership was due to expire, and gave judgment for payment accordingly, subject in the case of the widow to deductions of the sums admittedly received by her. The respondents accepted the judgment of the courts below and had not cross-appealed.

1943. May 11, 12. *Rewcastle K.C.* and *Kyffin* for the appellant.

Quass for the respondents.

June 24. The judgment of their Lordships was delivered by LORD MACMILLAN, who stated the facts, and continued: If the agreement of 1925 is valid and binding it affords a complete answer to the respondents' claim for it quantifies and provides for the payment to them of the deceased's share in the partnership assets. The only question argued before their Lordships, and the only question which it is necessary for them to decide, is whether the appointment of Shaheen and the deceased's widow as guardians of the two minor sons of the deceased was competently effected. If it was not, the agreement of 1925 is invalid and the judgment below must stand.

The certificate whereby the deceased's widow was appointed guardian to the minor sons and Shaheen was appointed to assist her in performing her duties as guardian was granted

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"(ii.) Jurisdiction in any other "matters of personal status of such "persons, where all the parties "to the action consent to their "jurisdiction."

"Matters of personal status" are defined in art. 51 of the Order in Council to mean "suits "regarding marriage or divorce, "alimony, maintenance, guardian-"ship, legitimation and adoption "of minors, inhibition from dealing "with property of persons who "are legally incompetent, succes-"sions, wills and legacies, and "the administration of the "property of absent persons."

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in 1925 on her application by the Ecclesiastical Court of the Greek Orthodox Patriarchate, Jerusalem. The jurisdiction of this ecclesiastical court to make the appointment is challenged, and the question has to be determined by examination and interpretation of the Palestine Order in Council of 1922. [Having referred to arts. 51 and 54 (i.), (ii.) of the Order in Council, his Lordship continued :] Now, it will be observed that, in conferring jurisdiction in matters of personal status on the courts of the several Christian communities (of which the court of the Greek Orthodox Patriarchate is one), the Order in Council in art. 54 discriminates between certain selected matters, enumerated in para. (i.), with regard to which it confers exclusive jurisdiction on these courts, and any other matters of personal status with regard to which, in para. (ii.), it confers jurisdiction only where all the parties to the "action" consent to their jurisdiction. Here the word "action" is used, presumably, as a synonym for the word "suit" used in art. 51. Neither word is strictly appropriate to denote non-litigious proceedings. Their Lordships, however, are inclined to infer from the context that these terms are used in a wide and general sense as meaning any proceedings of a judicial character in which the powers of a court are invoked. Assuming, without deciding, this to be so, their Lordships are of opinion that all the proper parties to the application for the appointment of guardians to the two minors did not consent to the jurisdiction of the ecclesiastical court, for the minors themselves did not, and could not, consent. Where a consensual jurisdiction requires for its constitution the consent of all parties, this must mean the consent of all whose interests are concerned in the proceedings. If it be said that minors cannot give an effective consent, this does not justify proceedings without their consent. In the case of a consensual jurisdiction absence of consent, whether due to unwillingness to consent or inability to consent, is equally fatal. On the other hand, if an application for the appointment of guardians does not fall within art. 54 (ii.), as not being a suit or action, then there is no provision in the Order in Council conferring jurisdiction on this ecclesiastical court to entertain such an application. In that case, the application would require to be made to the Supreme Court, sitting as a High Court of Justice, which, by art. 43 of the Order in Council, has "jurisdiction to hear and determine such matters as are not "causes or trials, but petitions or applications not within the

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"jurisdiction of any other court and necessary to be decided "for the administration of justice." Thus, either way, the appointment of guardians was invalid. It was made either by the wrong court or by a court for whose jurisdiction consent was essential but was wanting. Consequently, the agreement of 1925 to which the invalidly appointed guardians were parties is of no binding force, except to the limited extent indicated in the judgment under appeal. Their Lordships will humbly advise His Majesty that the appeal should be dismissed, and the judgment of the Supreme Court affirmed. The appellant will pay the respondents' costs of the appeal.

Solicitors for appellant: *T. L. Wilson & Co.*
Solicitors for respondents: *Windsor & Brown.*

[PRIVY COUNCIL.]

J. C.*
1943
July 8.

ABITIBI POWER AND PAPER COMPANY, LIMITED . . . . . APPELLANT;

AND

MONTREAL TRUST COMPANY AND OTHERS . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR ONTARIO . INTERVENER.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Canada (Ontario) — Provincial legislation — Validity — Company — Winding-up order—Mortgagee's action to enforce security—Liberty to proceed notwithstanding winding-up order—Moratorium legislation staying all proceedings—Act regulating " property and civil rights " in province "—British North America Act, 1867 (30 *&* 31 *Vict.* c. 3), s. 91 (21.) ; s. 92 (13.)*—Abitibi Power and Paper Company Limited Moratorium Acts,* 1941 *and* 1942, *of Ontario.*

While a mortgagee's action against the appellant company to enforce the security by sale of the company's property, assets and undertaking was pending in the provincial court in Ontario an unsecured creditor obtained court orders adjudicating the company

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* *Present:* Lord Atkin, Lord Thankerton, Lord Russell of Killowen, Lord Macmillan, and Lord Wright.

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bankrupt and for its winding-up under the Winding-up Act, a Dominion Act (R. S. C., 1927, c. 213), which, by s. 21, stays all proceedings after the winding-up order except with leave of the court. Thereafter, on the application of the mortgagee, an order was made under the Winding-up Act of the Dominion by the provincial court in Ontario, which acted in that capacity as a dominion court exercising dominion jurisdiction, allowing the mortgagee's action to proceed notwithstanding the winding-up order. Subsequently, the Ontario legislature passed a Moratorium Act which provided (inter alia) that no new action should be brought for the purpose of realizing on the mortgage and no further step taken in the action then pending without the consent of the Attorney-General. On a claim by the mortgagee that the Moratorium Act was ultra vires the provincial legislature :—

Held, that the mortgagee's action, although continued by leave of the winding-up court, never became a proceeding in the winding-up, and that the temporary interference with it by the legislature to which it was subject did not carry it into the field of "bankruptcy "and insolvency," which were matters within the exclusive legislative competence of the dominion parliament under s. 91 (21.) of the British North America Act, 1867; but that the pith and substance of the Moratorium Act was to regulate "property and "civil rights within the province," and it was, therefore, intra vires the legislature of the province under s. 92 (13.) of the British North America Act.

Judgment of the Court of Appeal for Ontario, [1942] O. R. 183, reversed.

APPEAL (No. 58 of 1942) from a judgment of the Court of Appeal for Ontario (March 21, 1942), affirming an order of the Supreme Court of Ontario (December 4, 1941) which had directed the sale by public auction, subject to a reserve bid, of the property, assets and undertaking of the appellant company, the Abitibi Power and Paper Co., Ld.

The following facts are taken from the judgment of the Judicial Committee. The appellant company was incorporated in 1914 by letters patent of the Dominion of Canada to acquire the undertaking of the existing company, the Abitibi Pulp and Paper Co. In 1928 it made an issue of first mortgage gold bonds, due 1953, of which in 1932 $48,267,000, with interest at five per cent., were outstanding. The bonds were charged on the whole property and undertaking of the company. There were also issued: $1,000,000 in 10,000 shares of seven per cent. cumulative preferred stock; $34,818,000 in 341,818 shares of six per cent. cumulative preferred stock; 1,088,117 common shares of no par value, on which the book value placed was $18,964,933. Subsidiary

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companies, in which the appellant company owned the majority of shares, also carried on similar businesses in Manitoba and Quebec. The gold bonds were secured by a trust deed in ordinary form, dated June 1, 1928, made between the appellant company and the present respondents, the Montreal Trust Co., whereby the company mortgaged and charged the whole of its property and undertaking to the trust company in trust for the holders of the first mortgage gold bonds. In 1932 the appellant company made default in payment of the half-yearly instalment of interest due on June 1, and thereupon, in pursuance of a power in the trust deed, the Montreal Trust Co., by writ issued on September 8, 1932, commenced the ordinary debenture holders' action claiming administration of the trusts of the debenture trust deed, a declaration that the indenture and mortgage were a first charge on the undertaking of the company, to have an account of what was due on the mortgage, to have the undertaking property and assets of the company sold under the direction of the court, and for the appointment of a receiver and manager. On September 10, 1932, Riddell J.A. appointed G. T. Clarkson receiver and manager of the undertaking, and gave leave to named members of a bondholders' committee to attend the proceedings. Subsequently, those persons, or some of them, were by order of Middleton J.A., dated September 13, 1935, added as defendants in the action, and were respondents to the present appeal in addition to the trust company. On September 15, 1932, an unsecured creditor, Canada Packers, Ld., filed a petition in bankruptcy against the appellant company, and on September 26, on the application of the same creditor, Sedgewick J. made four consecutive orders: (1.) Granting leave to the creditor to proceed against the company under the provisions of the Bankruptcy Act and/or the Winding-up Act, and confirming the petition dated September 15. (2.) On the creditor's petition adjudicating the company bankrupt, making a receiving order against it, and appointing a custodian of the estate. (3.) Granting leave to the creditor to apply for a winding-up order against the company. (4.) On the petition of the creditor declaring that the company was insolvent, and ordering it to be wound up. On November 25, 1932, F. C. Clarkson was appointed liquidator of the company, and so acted until December 20, 1935, when he resigned, R. S. McPherson being appointed in his place. The Winding-up Act (a Dominion Act, R. S. C., 1927, c. 213,

s. 21) provides: "After the winding-up order is made, no "suit, action or other proceeding shall be proceeded with or "commenced against the company, except with the leave of "the court and subject to such terms as the court imposes." The court referred to was the appropriate provincial court acting in that capacity as a dominion court with dominion jurisdiction. On December 7, 1932, the following order was made by Garrow J.:

"In the Matter of the Winding-up Act, being c. 213 "of the Revised Statutes of Canada, 1927, and Amending "Acts, and In the Matter of Abitibi Power and Paper "Co., Ld.

"1. Upon the application of counsel for Montreal Trust "Company, the plaintiff in an action commenced in this court "on September 8, 1932, against the above named Abitibi "Power and Paper Co., Ld., for the enforcement of the trusts "and security of a certain deed of trust and mortgage, dated "as of June 1, 1928, made by the said Abitibi Power and Paper "Co., Ld., in favour of the said Montreal Trust Co. and the "National City Bank of New York as trustees, in the presence "of counsel for F. C. Clarkson, Esq., the liquidator appointed "herein, upon reading the writ of summons in the said action "and upon hearing what was alleged by counsel aforesaid.

"2. It is ordered that the said Montreal Trust Co. shall "be at liberty to proceed with the said action against the said "Abitibi Power and Paper Co., Ld., notwithstanding the "winding-up order made herein September 26, 1932.

"D'ARCY HINDS,
"Registrar, S.C.O."

Thereupon, the action proceeded leisurely as negotiations from time to time took place for a reconstruction, and it was not till February 15, 1937, that the statement of claim was delivered claiming the relief mentioned in the writ. On September 16, 1937, the appellant company delivered its defence, alleging on various grounds that the charge was not valid, and disputing the jurisdiction of the provincial court save for the purpose of determining the validity of the charge. On November 3, Kingstone J., on the trial of the suit, declared the charge valid and gave liberty to apply as to any further directions. On June 10, 1940, Middleton J.A., on motion of the trust company, ordered a sale of the appellant company's undertaking under the direction of the master, and gave leave to any bondholder to bid. In October the master reported that he had received two bids of $30,000,000 and $40,000,000. The latter he rejected as not complying with the conditions of sale, but he reported that neither bid was equal to the reserve which he had fixed. The sale, therefore, proved abortive. On November 1, 1940, a Royal Commission was appointed by Order in Council in Ontario, consisting of three commissioners "to inquire into the affairs and financial "and corporate structure of the [appellant] company with a "view to recommending an equitable plan for solving the "financial difficulties of the company so that the company "may be in a position to meet conditions, regulations, and "restrictions which the Lieutenant-Governor in Council may "consider necessary upon the grant or renewal of the herein-"before recited leases, licences, water power rights, flooding "rights, licences of occupation and other rights, powers or "privileges; and generally to make such recommendations in "the premises as appear to be in the best interests of all "parties concerned, including the province of Ontario." On March 17, 1941, the commission reported. They criticized the present dominion legislation in so far as it dealt with schemes of reconstruction of such large concerns as the present, they stated that the government and the public had a huge stake in the pulp and paper industry and that no price could be obtained for the undertaking and assets under present conditions which would begin to approach the amount of the outstanding bonds with interest thereon, and they outlined a plan whereby the maturity of the bonds was extended for twenty-five years with provisions for maintaining the rights of the bondholders and, in the absence of default, for payment by instalments of some portion of the ordinary creditors' claims. They recognized that to secure that object recourse would have to be had to dominion legislation. Meantime, on November 25, 1940, the trust company had given a further notice of motion for sale which was ordered to stand over pending the report of the Royal Commission. After the report of the Royal Commission the legislature of Ontario, on April 9, 1941, passed the Abitibi Power and Paper Company Limited Moratorium Act. It recited the various motions for sale, a summary of the report of the Royal Commission, and, finally: "whereas it is deemed desirable to stay any action "now pending or that may hereafter be taken under the "provisions of the above-mentioned bond mortgage for the "sale of all the property and assets of the said company situate "in Ontario in order that an opportunity may be given to all "parties concerned to consider the plan submitted in the "report of the said Royal Commission," and then it proceeded to enact (s. 1) that, so far as any property in Ontario was concerned, no further proceedings should be taken or continued under the order of Middleton J.A. of June 10, 1940. [That, in fact, was already exhausted]; (s. 2) that, without the consent of the Attorney-General, no new action should be brought for the purpose of realizing on the mortgage and no further step should be taken in the action then pending. The Act was to come into force on a day to be named by the lieutenant-governor, and by Order in Council its operation might be determined at any time, but otherwise it was to remain in force until December 31, 1942. On October 9, 1941, the notice of motion for sale which was then standing over was renewed, and on the same day the lieutenant-governor made a proclamation bringing into force the Moratorium Act. On October 17, the trust company gave notice that at the hearing of the motion for sale the validity of the Moratorium Act would be disputed on the ground that it dealt with matters that fell under the head " Bankruptcy and Insolvency " in s. 91 (21.) of the British North America Act, 1867. The motion was heard on November 27, 1941, by Middleton J.A., who, in a considered judgment, given on December 4, 1941, held that the Act was ultra vires, and ordered the sale of the property and assets of the company to take place under the direction of the master and subject to a reserve bid, with liberty to the bondholders to bid. On appeal, that order was affirmed by the Court of Appeal (Riddell, Fisher, Henderson JJ.A., and Hogg J., Gillanders J.A. dissenting). The appellant company appealed.

1943. May 27, 28, 31; June 1. *Sir Walter Monckton K.C.* and *Gahan* for the appellant company. The Moratorium Act, when its true nature and character are examined, is in pith and substance legislation in relation to property and civil rights in the province, and, accordingly, within the competence of the provincial legislature under s. 92 (13.) of the British North America Act, 1867. The property is the property of the company in Ontario, and the civil right is the trust company's right to enforce the security under the directions of the provincial court. The Moratorium Act is not on its face or in substance bankruptcy or insolvency legislation, which is normally concerned with the rateable distribution of assets. This Act has no concern with that matter. The trust company's action, in which the Act intervened, was released from the administration of bankruptcy and insolvency legislation by the order under s. 21 of the Winding-up Act of the Dominion, and the trust company was left free of intervention by the Dominion to conduct the case subject to all the incidents of an ordinary case in the Ontario courts. It is within the legislative competence of the province to pass a moratorium Act, whether general or particular. In *Day* v. *City of Victoria* (1), a moratorium Act was held intra vires the province as dealing with property and civil rights, and that case was mentioned with approval in *Board of Trustees of Lethbridge Northern Irrigation District* v. *Independent Order of Foresters* (2). The following authorities show that, if a provincial Act is in pith and substance in relation to a head of s. 92 of the British North America Act—in this case "property and civil rights"—it is valid notwithstanding that it may be designed to remedy a condition of threatened or actual insolvency: *L'Union St. Jacques de Montreal* v. *Belisle* (3); *Attorney-General for Ontario* v. *Attorney-General for the Dominion of Canada* (4); *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (5); *Royal Bank of Canada* v. *Larue* (6); *Reference re Companies' Creditors Arrangement Act* (7); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (8); and *Ladore* v. *Bennett* (9). The last-named case, apart from *Day* v. *City of Victoria* (1), is the most material, and shows that the mere fact that insolvency was picked out as a reason for dealing in a particular way with an unsuccessful institution, did not colour the legislation as relating to insolvency so as to make it fall under s. 91 (21.) of the British North America Act. [Reference was also made to *Attorney-General for Alberta* v. *Attorney-General for Canada* (10).] If the whole subject-matter of the legislation is not covered by "property and civil rights within the "province," or by s. 92 (5.) of the British North America Act, which deals with "the management and sale of public lands

(1) [1938] 3 W. W. R. 161, 177.
(2) [1940] A. C. 513, 532.
(3) (1874) L. R. 6 P. C. 31.
(4) [1894] A. C. 189.
(5) [1898] A. C. 700, 714.
(6) [1928] A. C. 187, 192, 196.
(7) (1934) S. C. R. (Can.) 659.
(8) [1937] A. C. 391, 397, 402.
(9) [1939] A. C. 468, 480.
(10) [1943] A. C. 356, 374.

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"belonging to the province and the timber and wood thereon," it falls within "the administration of justice within the "province" under s. 92 (14.), which includes procedure in civil courts. A moratorium Act is procedural law: *Huber* v. *Steiner* (1).

Barton K.C. and *Gahan* for the Attorney-General for Ontario (intervener). This case turns entirely on the effect of s. 21 of the Winding-up Act, and that section, when put into operation, does no more than remove a particular barrier imposed by the Bankruptcy Act, and leaves the mortgagee's action free to proceed subject to provincial control. It is an unqualified leave. This Moratorium Act does not relate to bankruptcy and insolvency. It deals with a provincial action for specific reasons and with certain definite aims, and it is legislation which is entirely within the provincial field as coming within the classes of subjects assigned exclusively to the provincial legislature by s. 92 (5.), (13.), (14.) and (16.) of the British North America Act, the last being: "Generally all matters of "a merely local or private nature in the province." [*Merchants Bank of Canada* v. *Eliot* (2) was referred to.]

Pritt K.C. and *Devlin* for the trust company. First, in pith and substance the Moratorium Act is legislation dealing with bankruptcy and insolvency. Secondly, if the Act does fall within a head of s. 92, and not within a head of s. 91, but touches bankruptcy and insolvency only incidentally, then, the field in regard to bankruptcy and insolvency being occupied by the Dominion, the latter must prevail. The principles applicable to the construction of ss. 91 and 92 of the British North America Act are summarized in *Attorney-General for Alberta* v. *Attorney-General for Canada* (3). This is in pith and substance an Act to stay, at least temporarily, proceedings for the realization by a creditor of certain assets of an insolvent bankrupt company which is being wound up because it is insolvent under dominion legislation with a view to the company's possible reconstruction or to modifying and improving the realization or nursing the assets and postponing for that purpose the time and manner of their ultimate distribution among the various classes of creditors in some reconstruction outside the winding-up. The power to interfere with an action for reasons of bankruptcy and insolvency vests in the Dominion. They have exercised it under s. 21 of the

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(1) (1835) 2 Bing. N. C. 202, 210.

(2) [1918] 1 W. W. R. 698.

(3) [1943] A. C. 356, 369.

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Winding-up Act in a particular way, but they can exercise it repeatedly by appropriate legislation, and because the Dominion can do it the province cannot. The tendency of the decisions of this Board has been to interpret "bankruptcy "and insolvency" widely: *Attorney-General for British Columbia* v. *Attorney-General for Canada* (1). The phrase now covers any provisions which parliament chooses to make, excluding anything colourable or indirect, to deal with any of the problems of persons who are insolvent debtors or the creditors of insolvent debtors: *Cushing* v. *Dupuy* (2). *Ladore* v. *Bennett* (3) is distinguishable, for the Act there dealt with the affairs of a municipal institution which is directly within s. 92 (8.), and it did not even trench on insolvency. The suggested approval of *Day* v. *City of Victoria* (4) in the *Lethbridge* case (5) is, it is submitted, rather an absence of disapproval than actual approval. The property of the company is being administered under the Winding-up Act on the basis and for the reason of insolvency, and the civil right of the trust company to enforce its security can be restricted, controlled, affirmed or destroyed within the scope of bankruptcy and insolvency by dominion authority alone. Assuming that the Moratorium Act deals with property and civil rights, it still infringes bankruptcy and insolvency because it stays actions for the purpose of restoring a company, and that is the function of bankruptcy and insolvency. With regard to "administration of justice" (s. 92 (14.)), this case is not true procedure: *Attorney-General for Alberta* v. *Attorney-General for Canada* (6). It deals with substantive matters.

Charles Romer K.C. and *Crispin* for respondent members of the bondholders' committee, adopted the argument for the trust company. The whole pith and substance of the Moratorium Act in the light of all the circumstances is bankruptcy and insolvency, and the fact that for another purpose or in another aspect it could be property and civil rights does not alter that: *John Deere Plow Co., Ld.* v. *Wharton* (7); *Attorney-General for Alberta* v. *Attorney-General for Canada* (6). The conditions on which secured creditors of an insolvent company may be compelled to accept a compromise of their rights have been clearly defined by dominion legislation, but, although that

(1) [1937] A. C. 391, 402.
(2) (1880) 5 App. Cas. 409, 415.
(3) [1939] A. C. 468.
(4) [1938] 3 W. W. R. 161.
(5) [1940] A. C. 513.
(6) [1943] A. C. 356.
(7) [1915] A. C. 330, 338.

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legislative field has been fully occupied by the Dominion, the Moratorium Act in question here purports to impose further interference, inasmuch as, in the absence of the consent of the Attorney-General for Ontario, the secured creditors are debarred from proceeding to enforce their security during the prescribed period.

Sir Walter Monckton K.C. in reply, referred to *Attorney-General for Alberta* v. *Attorney-General for Canada* (1).

July 8. The judgment of their Lordships was delivered by LORD ATKIN, who stated the facts, and continued: The question in the case is the validity of Acts of the Ontario legislature, the Abitibi Power and Paper Company Limited Moratorium Act, 1941, and a further Act, the Abitibi Power and Paper Company Limited Moratorium Act, 1942. As may be seen from the capital structure, the appellant company was a vast undertaking, dependent for its supply of pulp wood on the Crown lands of the province of Ontario, which it obtained under agreements for twenty-one years, and dependent for its water power on leases and licences from the Crown. A convenient summary of the position is given by Robertson C.J. (Ontario) in his judgment giving leave to appeal in the present case (2): "An essential part of the property covered by the "mortgage consists of leases, licences, agreements, water power "rights, privileges, franchises and concessions granted by the "province of Ontario. As is stated in the report of a Royal "Commission that inquired into the affairs of the [appellant] "company, whose report is before us and was referred to in "argument, 'Abitibi is dependent for its supply of pulpwood "'upon the Crown lands of the province of Ontario. It also "'requires large quantities of power, in respect of which it is "'dependent upon leases from the province.' These licences, "leases and other rights are granted in most, if not in all, cases "for fixed terms of years, and some of these have expired or are "about to expire. As to some others the company is in default "either in payment or in the performance of its covenants. "If the province of Ontario should exercise its rights strictly, "the mortgaged premises would hardly be saleable at any "price. Mills in which large sums of money are invested would "be worthless without power to run them or pulpwood to "supply them. In the report of the Royal Commission "to which I have referred there is set forth a long list of

(1) [1939] A. C. 117, 130. (2) [1942] O. R. 321, 337.

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"the [appellant] company's further requirements from the "province, as given by the receiver. No doubt, the province "is in the habit of co-operating fairly with persons who invest "their money in establishing and developing industries on the "lands of the Crown and in opening them up to settlement "and improving them, but when, as here, there may be danger "that many persons who have invested largely will lose their "investment, the government of the province may have some "concern. It may well be that on a sale for cash none but "bondholders who can turn in their bonds in payment will be "in a position to buy, especially in view of the difficulty of "raising large amounts of capital for such investment in war "time. To avoid a result that may wipe out the investment "of a great many people and that in such an event may cause "some embarrassment to the government in dealing with the "property rights and interests of the province, it is, to say "the least, understandable that the proposed sale for cash "should be the subject of some concern to the legislature, "whatever opinion one may have as to the power of the "legislature to enact the statute in question."

Up to the time, on September 10, 1932, when Riddell J.A. appointed a receiver and manager of the undertaking of the appellant company the action was plainly a mortgagee's action brought in the courts of Ontario, affecting property in Ontario and the civil rights of the mortgagee, and subject to the exclusive authority of the provincial courts and the provincial legislature. It has to be determined how far, if at all, this position was altered by the subsequent proceedings. The objection to the Moratorium Act that was expressed by Middleton J.A. and by the members of the Court of Appeal may be summarized by saying that leave to continue the action had been given under the powers of the Dominion Act (Winding-up Act, s. 21), and that the legislature could not thereafter interfere with the proceedings in the action without encroaching upon the exclusive dominion powers to legislate on the class of subjects: "bankruptcy and insolvency." The right to take away the cause of action, said Fisher J.A., is vested in the Dominion unless the Dominion has not seen fit to deal with it, and s. 21 of the Winding-up Act does deal with it. Henderson J.A. went further and was of opinion that legislation in the province passed in respect to property and civil rights in the province must not be legislation aimed at a particular firm or corporation but must be general in character. "The legislature

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"is not competent to deny access to His Majesty's courts in an "individual case."

Their Lordships are unable to agree with the decision in the Ontario courts. It has to be remembered that this action, when commenced, was subject solely to the laws of the province which at any time, in pursuance of the sovereign power entrusted to the legislature in this respect, might be altered as the legislature thought fit. When the company was ordered to be wound-up the bondholders might, in pursuance of ss. 78 to 84, claim in the winding-up as secured creditors. They would in that case have had to put a specified value on the security, and the liquidator could have consented to the retention by the creditors of their security or could have required the transfer to him at the specified value to be paid out of the estate when he had realized the security. The bondholders in this case made no claim at all in the winding-up. Their security was known to be insufficient to meet the mortgage debt, and they deliberately remained outside and proceeded to continue to exercise what may be called their provincial rights against the provincial property. They were required by s. 21 of the Winding-up Act to get leave to continue their action, a provision which is not directed to secured creditors alone, but is applicable to all claims against the company, whether in contract, or tort, or otherwise. In view of the circumstances, the leave to proceed was ex debito justitiae. The court could not rightly have refused it. Once granted, the action proceeded as a provincial action, subject to the provincial law regulating the rights in such an action and subject to the sovereign power of the legislature to alter those rights in respect of property within the province. It could not be denied that the action proceeded subject to the possibility of being stayed under the ordinary rules of procedure as, for instance, for security for costs, default in pleading or discovery, or any special circumstances which the court might think demanded a stay. Middleton J.A. appreciated this position, but he expressed the opinion that the action would proceed in accordance with the orders and rules of practice that were in existence at the date of the application. The limitation to existing rules is significant. Their Lordships can see no ground for such a restriction. If the rules of procedure were subsequently altered before the action came to an end, it must proceed thereafter subject to the rules as amended. The province, therefore, could enact rules in the course of the action imposing a further ground of stay, and, if it can thus impose what may be a general moratorium, there is no reason why its sovereign power should be so limited as not to enable it to impose, if it so desired, a moratorium limited to a special class of action or suitor, or to one particular action or suitor. There appears to be no authority, and no reason for the opinion, that legislation in respect of property and civil rights must be general in character and not aimed at a particular right. Such a restriction would appear to eliminate the possibility of special legislation aimed at transferring a particular right or property from private hands to a public authority for public purposes. The legislature is supreme in these matters, and its actions must be assumed to be taken with due regard for justice and good conscience. They are not, in any case, subject to control by the courts. The short answer, therefore, to the contentions of the trust company is that the action, though continued by leave of the winding-up court, never became a proceeding in the winding-up, and that the temporary interference with it by the legislature to which it was subject was not an intrusion into the field of bankruptcy and insolvency.

It was pressed on their Lordships that the real substance of the legislation was an attempt to coerce the bondholders into accepting a plan of reconstruction, and that arrangements such as were contemplated by the report of the Royal Commission were within the exclusive field of dominion legislation. So they are, but this Board must have cogent grounds before it arising from the nature of the impugned legislation before it can impute to a provincial legislation some object other than what is to be seen on the face of the enactment itself. In the present case their Lordships see no reason to reject the statement of the Ontario legislature, contained in the preamble to the Act, that the power to stay the action is given so that an opportunity may be given to all the parties concerned to consider the plan submitted in the report of the Royal Commission. That the Act was renewed in March, 1942, by another temporary Act expiring in June, 1943, affords no reason for modifying this view, nor does the fact that the plan suggested by the Royal Commission involves recourse to dominion legislation. The pith and substance of this Act is to regulate property and civil rights within the province. It was contended that the Act was passed in relation to the management and sale of the public lands belonging to the province and of the timber and wood thereon, but, in view of what has been said on the topic of property and civil rights in the province, it is unnecessary to discuss this further ground for supporting the validity of the Act.

A preliminary objection was taken to the regularity of the order of the Court of Appeal on the ground that the case did not fall within s. 1 of the Privy Council Appeals Act, R. S. O., 1937, c. 98, giving an appeal where the matter in controversy in any case exceeds the sum or value of $4000. It was said that the order under appeal was an interlocutory order, and the appeal was granted because there were exceptional circumstances by reason of the importance of the constitutional question. Their Lordships intimated at once that, if necessary, in view of the constitutional question they would give leave to file a petition for special leave in favour of which they would report, and counsel for the trust company very reasonably did not further press the objection. Their Lordships are, however, satisfied that the order in question, which forms one of the final orders asked for in the statement of claim, whether it were interlocutory or not, relates to a matter in controversy which exceeds the sum in value of $4000. If a litigant is to be deprived by order of the court of any rights over a property worth $30,000,000, as he is by an order of sale to which he objects, it would appear reasonable to hold that there is a matter in controversy raised by the appeal exceeding the sum of $4000. On this ground, the preliminary objection fails.

For these reasons the appeal should be allowed, the orders of Middleton J.A. and the Court of Appeal should be set aside, and the motion for sale should be dismissed, and their Lordships will humbly advise His Majesty accordingly. The trust company must pay the costs of the appellant company in the Ontario courts and on this appeal.

Solicitors for appellant company and for the intervener: *Blake & Redden.*

Solicitors for trust company: *Lawrence Jones & Co.*

Solicitors for individual respondents: *Linklaters & Paines.*

Referred to. ATT.-GEN. FOR B. C. *v.* ESQUIMALT AND NANAIMO RY. CO. [1950] A. C. 87

[PRIVY COUNCIL.]

J. C.* ATLANTIC SMOKE SHOPS, LIMITED . APPELLANTS ;

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July 30. CONLON AND OTHERS . . . . RESPONDENTS.

ATTORNEY-GENERAL FOR CANADA AND OTHERS . . . . INTERVENERS.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada (New Brunswick)—Provincial legislation—Constitutional validity—" Direct taxation within the province "—Percentage of retail price—Payable by last purchaser, principal or agent—Tobacco Tax Act, 1940 (4 *Geo.* 6, *c.* 44), *of New Brunswick—British North America Act,* 1867 (30 & 31 *Vict. c.* 3), *s.* 92 (2.), *ss.* 121, 122.

The Tobacco Tax Act, 1940, of New Brunswick, which provides by s. 4 that a tax of ten per cent. of the retail price shall be paid at the time of making the purchase by anyone who buys tobacco for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province, and that the tax is to be paid by an agent where he purchases on behalf of a principal, and by s. 5 that, if a person residing or carrying on business in New Brunswick, brings tobacco into the province or receives delivery of it there for his own consumption he, or his agent, if the transaction is so effected, shall pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the province, is in all respects a valid exercise of the powers of the provincial legislature under head (2.) of s. 92 of the British North America Act, 1867, as constituting " direct taxation " within the province." The tax, which is to be paid by the last purchaser of the article, the money for it being found by the individual who finally bears the burden of it, satisfies John Stuart Mill's test for a direct tax—" one which is demanded from the " very persons who it is intended or desired should pay it "—the use of which in interpreting the phrase " direct taxation " in head (2.) of s. 92 of the Act of 1867 has long been firmly established and is fully justified. Further, the tax, being demanded from the very persons who it is intended or desired should pay it, is none the less direct even if it may be described as an excise tax.

Bank of Toronto v. *Lambe* (1887) 12 App. Cas. 575, 582; *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* [1934] A. C. 45, 55, referred to.

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* *Present :* VISCOUNT SIMON L.C., VISCOUNT SANKEY, VISCOUNT MAUGHAM, LORD ATKIN, LORD RUSSELL OF KILLOWEN, LORD WRIGHT and LORD ROMER.

When the purchase is made by an agent acting for his principal the tax nevertheless remains "direct," being paid by the agent for and on behalf of his principal who really bears it, and the production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco.

Held, also, that s. 5 of the Tobacco Tax Act does not impose a customs duty, the tax being a direct one on the consumer, and is not invalid as amounting to an attempt to tax in disregard of the restrictions contained in ss. 121 and 122 of the Act of 1867.

Attorney-General for British Columbia v. *Kingcome Navigation Co.* [1934] A. C. 45, at p. 59; and *Gold Seal, Ld.* v. *Attorney-General for Alberta* (1921) 62 S. C. R. (Can.) 424, 439, referred to.

Judgment of the Supreme Court of Canada [1941] S. C. R. (Can.) 670, varied.

APPEAL (No. 19 of 1942), by special leave, from a judgment of the Supreme Court of Canada (October 7, 1941) which, by a majority, had declared that the Tobacco Tax Act, 1940, of New Brunswick (1) was within the constitutional powers of

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(1) By Tobacco Tax Act, 1940, s. 2: "In this Act, unless the "context otherwise requires, (*a*) "'consumer' or 'consumer of "'tobacco' means any person "who, within the province, pur-"chases from a vendor tobacco at "a retail sale in the province for "his own consumption or for the "consumption of other persons at "his expense or who, within the "province, purchases from a ven-"dor tobacco at a retail sale in the "province on behalf of or as agent "for a principal who desires to "acquire such tobacco for con-"sumption by such principal or "other persons at the expense of "such principal. (*b*) 'Minister' "means the Provincial Secre-"tary-Treasurer. (*c*) 'Package' "means package, box, tin or "other container in which tobacco "is contained or sold. (*d*) 'Pur-"'chaser' means any person who, "within the province, purchases "from a retail vendor tobacco at "a retail sale in the province. "(*e*) 'Retail sale' means a sale to "a consumer for purposes of "consumption and not for resale. "(*f*) 'Retail vendor' means any "person who, within the province, "sells tobacco to a consumer. "(*g*) 'Tobacco' means tobacco in "any form in which tobacco is "consumed and includes snuff. "(*h*) 'Vendor' includes both "wholesale vendor and retail "vendor. (*i*) 'Wholesale vendor' "means any person who, within "the province, sells tobacco for "the purpose of resale."

Sect. 3: "(2.) No person shall "sell any tobacco in the province "at a retail sale unless he holds a "retail vendor's licence issued "to him under authority of this "Act and such licence is in force "at the time of sale. (4.) Vendor's "licences and such other licences "as may be prescribed by the "regulations shall be issued "annually by the minister upon "payment of such fee or fees as "may be required by the regula-"tions. All licences shall expire "on the thirtieth day of June "following the issue thereof. "(5.) The minister may cancel or

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the province with the exception of the provisions thereof making an agent liable for the tax, and had dismissed an appeal from a judgment of the Supreme Court of New Brunswick (Appeal Division) (December 3, 1940) which on a special case had found the Act in its entirety to be within the constitutional powers of the province as being "direct taxation within the "province" under head (2.) of s. 92 of the British North America Act, 1867.

The special case stated (inter alia) that the appellants were a Dominion company, having their head office in the city of St. John, in New Brunswick; that on October 15, 1940, they opened a store in that city where they carried on the business of selling tobacco, including cigars and cigarettes, without

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"suspend any licence for failure to "comply with any of the provisions of this Act."

Sect. 4: "Every consumer of "tobacco purchased at a retail "sale in the province shall pay "to His Majesty the King in the "right of the province for the "raising of a revenue, at the time "of making his purchase, a tax "in respect of the consumption of "such tobacco, and such tax shall "be computed at the rate of ten "per centum of the retail price of "the tobacco purchased."

Sect. 5: "Every person residing or ordinarily resident or "carrying on business in New "Brunswick, who brings into the "province or who receives delivery in the province of tobacco "for his own consumption or for "the consumption of other persons "at his expense or on behalf of "or as agent for a principal who "desires to acquire such tobacco "for consumption by such principal or other persons at his "expense shall immediately report the matter to the minister "and forward or produce to him "the invoice, if any, in respect of "such tobacco and any other "information required by the "minister with respect to the "tobacco and shall pay the same "tax in respect of the consumption of such tobacco as would "have been payable if the tobacco "had been purchased at a retail "sale in the province at the same "price."

Sect 10: "A consumer shall be "and remain liable for the tax "imposed by this Act until the "same has been collected."

By s. 92 of the British North America Act, 1867: "In each "province the legislature may "exclusively make laws in relation "to matters coming within the "classes of subjects next hereinafter enumerated, that is to "say: . . . . 2. Direct taxation "within the province in order to "the raising of a revenue for "provincial purposes."

By s. 121: "All articles of the "growth, produce, or manufacture "of any one of the provinces shall, "from and after the Union, be "admitted free into each of the "other provinces."

By s. 122: "The customs and "excise laws of each province "shall, subject to the provisions "of this Act, continue in force "until altered by the Parliament "of Canada."

having obtained any licence so to do under the Tobacco Tax Act or the regulations made thereunder; that the appellants sold at retail tobacco manufactured in provinces of Canada other than New Brunswick to persons defined by s. 2 (*a*) of the Act as "consumers" or "consumers of tobacco" without collecting the tax imposed by the Act; that the first respondent, James H. Conlon, was, on the coming into force of the Act, appointed Tobacco Tax Commissioner; that, on November 2, 1940, and from time to time thereafter, the second respondent, John McDonough, an inspector appointed under the Act, and others, while acting under the instructions of the other respondents, entered on the appellant's premises and proceeded to ask customers whether they had paid the provincial tax on the tobacco purchased by them, to request them to produce their tobacco tax receipt, and to demand their names and addresses; and that the question for the opinion of the court was whether the Act, or any of the provisions thereof, and the regulations made thereunder, or any of them, were ultra vires the legislature of New Brunswick, and, if so, in what particular or particulars. The third respondent was the Attorney-General for New Brunswick. The individual opinions of the judges in the courts below appear from the judgment of the Judicial Committee.

1943. May 4, 6, 10, 11, 13, 14, 17, 18, 20, 21, and 24. *Pritt K.C.* and *Holroyd Pearce* for the appellants. The appellants rely on four propositions: (i.) This is not direct taxation because it is a sales tax, and a sales tax is an excise tax and, therefore, indirect. Moreover, this is a tax on a transaction or a commodity. It is not direct taxation because it is capable of being passed on. It is certainly indirect taxation so far as it deals with the agent. (ii.) If it is not a sales tax, but is rather a consumption tax, then it is not taxation "within the province," because it is levied regardless of where the consumption may take place. (iii.) Sect. 5 is bad as being (*a*) legislation relating to customs and excise, (*b*) as infringing s. 121 of the British North America Act, 1867, and (*c*) as the regulation of trade and commerce, which brings s. 5 under s. 91 of the Act of 1867. (iv.) If the provisions for taxing the agent, or the rest of the provisions of s. 5, are invalid and ultra vires, they are not severable, because without them the Act could scarcely achieve its purpose, and it cannot be assumed that the legislature would have meant to pass in its truncated form an Act which probably would not work. The following authorities deal with direct and indirect taxation: *Attorney-General for Quebec* v. *Queen Insurance Co.* (1); *Attorney-General for Quebec* v. *Reed* (2); *Bank of Toronto* v. *Lambe* (3); *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (4); *Cotton* v. *Regem* (5), in which Lord Moulton quotes John Stuart Mill's test for a "direct" tax as being "one which is demanded from the very persons "who it is intended or desired should pay it," and an "indirect" tax as one demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another; *Attorney-General for Manitoba* v. *Attorney-General for Canada* (6); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (7); *City of Halifax* v. *Fairbanks' Estate* (8), one of the two most important cases from the appellant's point of view; *Rex* v. *Caledonian Collieries* (9); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (10); *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction* (11); and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ld.* (12). The cases show that a tax on the purchase of a commodity imposed at the time of the purchase and with respect to the commodity purchased is an indirect tax. *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (13), where the province imposed a tax on fuel oil consumption which was paid by the consumer because he was the consumer and not in relation to any dealings with the commodity, is distinguishable. There was there no definition of "consumer." If the *Kingcome* case (13) appears to infringe the principle that a sales tax is an indirect tax, the answer is that it was not necessary to say that the tax in that case was not a tax of that class at all. The Board were sailing in narrow waters. Further, this is a tax which is reasonably capable of being passed on, (*a*) by resale in the province where the purchaser changes his intention and decides not to smoke the tobacco, and (*b*) by resale anywhere in the dominion outside

(1) (1878) 3 App. Cas. 1090.
(2) (1884) 10 App. Cas. 141.
(3) (1887) 12 App. Cas. 575, 581.
(4) [1897] A. C. 231, 235.
(5) [1914] A. C. 176, 189, 193.
(6) [1925] A. C. 561.
(7) [1927] A. C. 934.
(8) [1928] A. C. 117.
(9) [1928] A. C. 358.
(10) [1930] A. C. 357.
(11) (1931) S. C. R. (Can.) 357, 362, 373.
(12) [1933] A. C. 168, 173, 175-176.
(13) [1934] A. C. 45, 58-59.

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the province, or even outside the dominion, where the tobacco is dearer than the price paid for it. With regard to the second proposition—that this is not taxation "within the province" —the actual consumption sought to be taxed, even if the taxation is "direct," is consumption anywhere in the world and that is extra-provincial legislation and must be bad. Sect. 5 of the Act is attacked as relating to customs and excise and as offending against s. 121 of the British North America Act, 1867, which provides that all articles of the growth, produce or manufacture of any of the provinces shall be admitted free into each of the other provinces. Sect. 5 cannot possibly live, and the statute without it, and without the provisions about agents, is wholly unworkable, and, therefore, the whole Act must go. The Act trespasses on the exclusive legislative power of the Dominion of Canada to impose duties of customs and excise. Further, s. 5 regulates the passage of trade between one province and another, and so falls within the express dominion power to regulate trade and commerce. If s. 5 and the other agency provisions are severed the Act could not be worked, and could not have been intended by the provincial legislature, which is the test. [On the question of severability reference was made to *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1); *Attorney-General for Canada* v. *Attorney-General for Ontario* (2); *Toronto Corporation* v. *York Corporation* (3); and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (4).]

Gahan, for the Attorney-General for Canada, supported the argument for the appellants, and also put forward the following contentions:—(1.) Sect. 5 imposes a customs or import duty or attaches a condition to the admission of tobacco into the province. (2.) In so far as s. 5 imposes a duty on goods from other parts of Canada it is invalid by reason of the absolute prohibition in s. 121 of the Act of 1867. (3.) In so far as s. 5 imposes a duty on goods from abroad it is invalid because the parliament of Canada has exclusive legislative authority over customs duties on goods from abroad. (4.) If s. 5 is invalid the whole Act falls, because the effect of enforcing the other provisions of the Act without enforcing s. 5 would produce results which the legislature of New Brunswick would not desire and could not have contemplated: *Bank of Toronto*

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(1) [1925] A. C. 561, 567.
(2) [1937] A. C. 355.
(3) [1938] A. C. 415, 426.
(4) [1937] A. C. 377, 387-388.

v. *Lambe* (1); *Gold Seal, Ld.* v. *Attorney-General for Alberta* (2); *City of Halifax* v. *Fairbanks' Estate* (3); *Citizens Insurance Company of Canada* v. *Parsons* (4); *Attorney-General for British Columbia* v. *Attorney-General for Canada* (5); *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Co.* (6); *Proprietary Articles Trade Association* v. *Attorney-General for Canada* (7); and *Attorney-General for Manitoba* v. *Attorney-General for Canada* (8). (5.) Sect. 4 imposes a sales tax, which is an excise tax, and, therefore, the section is invalid because the parliament of Canada has exclusive legislative authority over excise: Halsbury's Laws of England, 2nd ed., vol. xxviii., pt. V., p. 330, note (*a*); the *Kingcome* case (9), which represents the limit to which the power of the province extends, and covers the whole of this proposition and also proposition (6.), which is (*a*) that ss. 4 and 5 impose taxation on a commodity and a transaction of sale and purchase, and (*b*) such a tax was recognized in and since 1867 as not being direct taxation. (7.) Sects. 4 and 5 tax an agent buying for another, and in that respect the tax is indirect: *Provincial Treasurer of Alberta* v. *Kerr* (10). (8.) The words taxing the agent cannot be severed because (i.) the remaining words would have to be rewritten to retain their present meaning, for mere striking out of the words affecting the agent's liability would change the construction of the remaining words, and (ii.) if the present meaning of the surviving words is retained, the Act is ineffective and the New Brunswick legislature cannot be presumed to have intended to pass it in its truncated form.

Tucker K.C. and *Frederick Grant* for the respondents. The pith and substance of the Act and the real nature of the tax must be ascertained. Its actual form is not conclusive: *Bank of Toronto* v. *Lambe* (11); *Rex* v. *Caledonian Collieries* (12); and *Board of Trustees of Lethbridge Irrigation District* v. *Independent Order of Foresters and Attorney-General for Canada* (13). Although the tax here is in respect of, or relating to, a commodity, it is imposed on a person because he has acquired the commodity with a particular intention. It is really a tax on the intention with which he acquired it. To

(1) 12 App. Cas. 575, 581.
(2) 62 S. C. R. (Can.) 424, 435, 456.
(3) [1928] A. C. 117, 124-125.
(4) (1881) 7 App. Cas. 96, 112.
(5) [1924] A. C. 222, 225.
(6) [1930] A. C. 357, 363-364.
(7) [1931] A. C. 310, 325.
(8) [1925] A. C. 561.
(9) [1934] A. C. 45.
(10) [1933] A. C. 710, 717, 722.
(11) 12 App. Cas. 575, 583.
(12) [1928] A. C. 358, 362.
(13) [1940] A. C. 513, 528-529.

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ascertain whether a tax is direct or indirect, it must be tested by Mill's formula, subject to the exception that where the tax falls within an established classification of taxation Mill's formula is not conclusive and the tax can be direct even though the burden of the tax can be passed on if desired. Such an established classification includes a tax imposed on a person in respect of real or personal property owned by him even though it is restricted to property used in a particular manner, and the tax will always be direct in such a case, provided that it is not property which the person liable to be taxed must be taken as intending to sell in the course of trade or otherwise deal in: *City of Halifax* v. *Fairbanks' Estate* (1). This tax falls within the established classification. Mill's test of indirect taxation is referred to in *Bank of Toronto* v. *Lambe* (2), and it shows (*a*) that the nature of the tax must be such that it can be passed on, (*b*) that the passing on of the burden is one which is left by the legislature to the discretion of the taxpayer, that is, the legislature imposes a tax which can be passed on, but makes no condition: the *Kingcome* case (3), and (*c*) the test presupposes that the tax can only be so passed on by some independent transaction between the taxpayer and the person to whom it is to be passed on: *Cotton* v. *Regem* (4); *Burland* v. *The King ; Alleyn* v. *Barthe* (5); and *Provincial Treasurer of Alberta* v. *Kerr* (6). This taxation is direct within the meaning of head (2.) of s. 92 of the British North America Act, 1867. The imposition and payment of the tax is not a part of the actual transaction of sale and purchase as between the vendor and purchaser, but is independent of it. The Act indicates with precision the person who is ultimately to bear the tax, and by its provisions ensures that, in all ordinary and normal circumstances, the burden of the tax will not and cannot be borne by, or passed on to, any other person. It is this general tendency of the tax which determines whether it is direct or indirect. [VISCOUNT SIMON L.C.: The Board are agreed that the main tax in s. 4 is, within Mill's definition, a direct tax. That leaves open the questions: (*a*) Is it in any sense excise? Even if it is, does this alter its validity as being direct? (*b*) Is the application of the tax to an agent authorized? (*c*) Is s. 5

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(1) [1928] A. C. 117, 120, 124 et seq.

(2) 12 App. Cas. 575, 582.

(3) [1934] A. C. 45, 57.

(4) [1914] A. C. 176, 189.

(5) [1922] 1 A. C. 215, 223, 227.

(6) [1933] A. C. 710, 713 et seq.

ultra vires? (*d*) Severability? (*e*) Does either s. 121 or s. 122 of the British North America Act affect the matter?] Dealing first with the agency point, in every purchase through an agent, the principal, whether disclosed or undisclosed, is a party to the contract of purchase and sale, and such contract can be enforced by, or against, the principal. In every case the principal himself becomes a "consumer" under the first part of the definition of that word in s. 2 (*a*) of the Act, and thereupon himself becomes personally liable for the tax under s. 10. As regards importation into the province by an agent, the act of importation by the agent is the act of the principal, who thereupon becomes personally liable for the tax under the first part of s. 5. Where an agent is personally liable for any tax the principal is also directly liable for the same tax, and payment by either will discharge the liability of both. Where an agent pays the tax in such cases he must be deemed to have paid the money on behalf of and at the implied request of his principal, and his right to be recouped by his principal arises under the general law of agency and not out of some further and independent transaction between himself and the principal. In *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) the Board apparently assumed that the tax there was direct on the principal, but that by charging the agent it was made indirect. That, however, is not this case, where the imposition of the tax on the agent is mere machinery for its collection from the principal. As regards s. 5, the payment of the tax is not a condition of admission of the tobacco into the province, but is charged only after it has been received by a person in the province, and it is not, therefore, invalid by reason of s. 121 of the British North America Act, 1867. If the tax charged under s. 5 is invalid, it is severable. Also, the Act does not offend against s. 122 of the Act of 1867. That section does not of itself forbid the imposition of any new duty. At the most it only forbids the alteration of those customs and excise duties of each province which were in force in 1867. The expression "customs and excise" has the ordinary and normal meaning, and a customs duty should answer the following tests: (i.) it is a tax on a commodity which the legislature expects to form a subject of trade, for customs and excise are essentially trading taxes; (ii.) with regard to customs, the payment is required before admission to the

(1) [1925] A. C. 561.

country; (iii.) customs duty is always imposed at a point in the economic chain other than the last link; (iv.) the legislature always intends that it should be passed on to somebody else solely at the volition of the person who pays it, or is indifferent whether it is passed on or not. Excise taxes have the same characteristics as customs duties except as to (ii.). This tax does not offend against the power of the Dominion under s. 91 (2.) to legislate for the regulation of trade and commerce. This Act was neither intended to, nor does it, regulate trade and commerce. Its pith and substance is to obtain revenue by imposing a tax on the acquisition of a particular article for a particular purpose: the *Kingcome* case (1). It is a tax placed on the last link of the financial chain. If it does regulate trade and commerce, then the provisions of s. 91 (2.) have to be read in a limited sense: *Shannon* v. *Lower Mainland Dairy Products Board* (2). In any event, if it regulates trade and commerce, it does so only within the province. The answer to the appellants' submission that it is not taxation "within the province" because consumption may take place anywhere, is that it is not a tax on consumption, but a tax on acquisition with a particular purpose. [Reference was made to *Forbes* v. *Attorney-General for Manitoba* (3).] Lastly, if s. 5 is bad as a whole, it is clearly severable, as also are any provisions of the Act which have been held objectionable as taxing an agent. *Attorney-General for Canada* v. *Attorney-General for Ontario* (4) and *Attorney-General for British Columbia* v. *Attorney-General for Canada* (5) are very different from the present case. The whole scheme of the present Act is not affected by the suggested severance, as it would have been in the above cases. The decision of the Supreme Court was right except on the question of agency.

Sir Walter Monckton K.C. and *Devlin* for the Attorney-General for Quebec. To ascertain its pith and substance the Act must be scrutinized in its entirety: *Attorney-General for Ontario* v. *Reciprocal Insurers* (6). This Act falls within s. 92 (2.) of the British North America Act. It hits the persons intended to be hit, and is a direct tax on the consumer, and whether it is payable before or after consumption is immaterial. Every possible precaution is taken by the Act to prevent

(1) [1934] A. C. 45, 59.
(2) [1938] A. C. 708, 718.
(3) [1937] A. C. 260, 272.
(4) [1937] A. C. 355.
(5) [1937] A. C. 377.
(6) [1924] A. C. 328, 337.

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the tax being passed on to others, and it is difficult, if not impossible, to do so, and that alone is a true test of the distinction between a direct and indirect tax. Exceptional cases where the person who has paid the tax may be able to pass it on are irrelevant. With regard to s. 121 of the British North America Act, the tax here is not imposed in respect of the admission of a commodity into the province, but on the purchase of it for consumption. As to the agency provision in s. 4 (read in conjunction with s. 2 (*a*)), it is only to ensure that the tax is paid that liability is put on the agent. It is not a question of shifting the burden of taxation. Making the agent, who will never be more than a messenger and who practically always is provided in advance with the money, liable for the tax does not make it an indirect one, even where the messenger advances the funds to pay the tax. In any event, this provision is severable. Sect. 5 of the Act does not levy a customs duty, nor is it imposed in connexion with the importation of tobacco in the province, but it is levied from the consumer once he is in possession for purposes of consumption. This case is very different from *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1) where there was the extensive use of brokers, factors, etc. [Reference was also made to *Attorney-General for Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec, and Nova Scotia* (2).]

F. W. Wallace for the Attorneys-General for Manitoba and Saskatchewan, *Tucker K.C.* and *Frederick Grant* for the Attorney-General for Prince Edward Island, *Devlin* for the Attorney-General for Ontario, and *Kyffin* for the Attorney-General for Nova Scotia all adopted the argument for the respondents.

Pritt K.C. replied.

July 30. The judgment of their Lordships was delivered by VISCOUNT SIMON L.C. This appeal from a judgment of the Supreme Court of Canada raises the important and difficult question whether the Tobacco Tax Act of New Brunswick, 1940 (4 Geo. 6, c. 44), and the regulations made thereunder are within the powers of the provincial legislature as constituting "direct taxation within the province," or whether, on the contrary, all or any part of these provisions must be held to be ultra vires having regard to the distribution

(1) [1925] A. C. 561, 566.

(2) [1898] A. C. 700, 713.

of legislative powers effected by the British North America Act, 1867, and to the bearing of ss. 121 and 122 of the Act on provincial taxing powers.

The New Brunswick Tobacco Tax Act is entitled "An Act "to provide for imposing a tax on the consumption of tobacco." [His Lordship referred to ss. 2 to 10 of the Act and continued :] There are thus four applications of the tax provided for by ss. 4 and 5 : (*a*) In its main and simplest form the tax is to be paid by anyone who purchases tobacco, as defined, for his own consumption (or for the consumption of other persons at his expense) from a retail vendor in the province. The tax amounts to ten per cent. on the retail price charged on the sale. By regulations made under s. 20 of the Act it is to be collected by the retail vendor, who is constituted an agent of the minister for the collection of the tax, and has to give a receipt for the tax to the customer and account to the Tobacco Tax Commissioner for the tax thus collected, subject to the allowance of three per cent. as remuneration. (*b*) If the purchase from the retail vendor is made by an agent acting for a principal, who desires to acquire such tobacco for his own consumption (or for the consumption of other persons at his expense), the tax is payable by the agent. It is, however, clear that if the agent has not already been put in funds by his principal, he will be entitled to be indemnified by his principal for the tax, no less than for the purchase price. In both cases ((*a*) and (*b*)) the tax is payable at the time of making the purchase. (*c*) If a person residing or ordinarily resident or carrying on business in New Brunswick brings into the province such tobacco, or receives delivery of it in the province, for his own consumption (or for the consumption of other persons at his expense), he is to report the matter to the minister, with any invoice and other information required, and he becomes liable to pay the same tax as would have been payable if the tobacco had been purchased at a retail sale in the province. (*d*) Lastly, if such a person as is last described brings the tobacco into the province, or receives delivery there, as agent for a principal who desires to acquire it for his own consumption (or for the consumption of other persons at his expense), the agent is put under a similar obligation to report and to pay an equivalent tax. It may be noted that in this last case the principal is not in express terms limited to a principal within the province. This is perhaps implied, but, in any event, the instance of an agent within the

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province acting for a principal outside can seldom occur.

A striking difference of opinion has disclosed itself in the Canadian courts as to the validity of this taxing legislation. In the Supreme Court of New Brunswick, Baxter C.J. and his two colleagues, Grimmer and Richards JJ., held that the tax was valid. Applying the definition of a direct tax which was used by Lord Hobhouse in *Bank of Toronto* v. *Lambe* (1), and which is derived from John Stuart Mill's "Principles of "Political Economy" (bk. V. c. 3) as "one which is demanded "from the very persons who it is intended or desired should "pay it," they held that the tax in all its forms was a direct tax and within the power of the provincial legislature to impose. On appeal to the Supreme Court of Canada, conflicting views were expressed, and these need to be carefully analysed. On the first and main form of the tax Duff C.J. and Davis J. held that the tax was not direct. The Chief Justice considered that the tax was a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser. He says that "the payment of the tax is not only a condition of "legal purchase; it is an integral element in the transaction "of sale and purchase passing from the purchaser to the "vendor as part of the price to the purchaser" (2). In effect, the argument is that this is a sales tax and that, being a sales tax, it is necessarily indirect. Rinfret J. and Crocket J. maintained the opposite view, and agreed with the judgment of the Supreme Court of New Brunswick that the tax in all its forms was intra vires. Kerwin J. took up an intermediate position. He considered that the tax in the form (*a*) was valid, but that the attempt to impose the tax on an agent failed as being indirect taxation. He further held that the tax in the forms (*c*) and (*d*) was also invalid as being an infringement of s. 121 of the British North America Act. Hudson J. held that the tax was valid, save so far as it imposed a liability on an agent, i.e., that (*a*) and (*c*) were valid, but that (*b*) and (*d*) were not, and Taschereau J. took the same view. In the result, therefore, the majority of the Supreme Court of Canada decided that the tax in the forms (*a*) and (*c*) was valid, but that it was invalid in the forms (*b*) and (*d*), since these latter forms involved taxation of an agent, whereas the burden of the taxation would fall on his principal. The arguments addressed to the Board, which included arguments on behalf of the Attorney-General for Canada, supporting the appellants,

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(1) 12 App. Cas. 575, 582.

(2) [1941] S. C. R. (Can.) 679.

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and of other interveners representing Quebec and five other provinces supporting the respondents, ranged over all aspects of the tax, and their lordships are requested to reach a conclusion as to the validity or non-validity of the tax in all its forms.

Their Lordships must first consider whether the tax in the form (*a*) is a valid exercise of provincial legislative powers. It has been long and firmly established that, in interpreting the phrase "direct taxation" in head 2 of s. 92 of the Act of 1867, the guide to be followed is that provided by the distinction between direct and indirect taxes which is to be found in the treatise of John Stuart Mill. The question, of course, as Lord Herschell said in *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1), is not what is the distinction drawn by writers on political economy, but in what sense the words were employed in the British North America Act. Mill's Political Economy was first published in 1848, and appeared in a popular edition in 1865. Its author became a member of parliament in this latter year and commanded much attention in the British House of Commons. Having regard to his eminence as a political economist in the epoch when the Quebec Resolutions were being discussed and the Act of 1867 was being framed, the use of Mill's analysis and classification of taxes for the purpose of construing the expression now under review is fully justified. In addition to the definition from Mill's Political Economy already quoted, citation may be made of two other passages as follows: "Direct taxes are either "on income or on expenditure. Most taxes on expenditure "are indirect, but some are direct, being imposed not on the "producer or seller of an article, but immediately on the "consumer" (bk. V. ch. 3). And again, in ch. 6, in discussing the comparative merits of the two types of tax, he takes as the essential feature of direct taxation that "under it everyone "knows how much he really pays." Their Lordships, therefore, consider that this tobacco tax in the form they have called (*a*) would fall within the conception of a "direct" tax, and ought so to be treated in applying the British North America Act. It is a tax which is to be paid by the last purchaser of the article, and, since there is no question of further re-sale, the tax cannot be passed on to any other person by subsequent dealing. The money for the tax is

(1) [1897] A. C. 231, 236.

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found by the individual who finally bears the burden of it. It is unnecessary to consider the refinement which might arise if the taxpayer who has purchased the tobacco for his own consumption subsequently changes his mind and in fact re-sells it. If so, he would, for one thing, require a retail vendor's licence. But the instance is exceptional and far-fetched, while for the purpose of classifying the tax, it is the general tendency of the impost which has to be considered. So regarded, it completely satisfies Mill's test for direct taxation. Indeed, the present instance is a clearer case of direct taxation than the tax on the consumer of fuel oil in *Attorney-General for British Columbia* v. *Kingcome Navigation Co.* (1), for fuel oil may be consumed for the purpose of manufacture and transport, and the tax on the consumption of fuel oil might, as one would suppose, be sometimes passed on in the price of the article manufactured or transported. Yet the Privy Council held that the tax was direct. In the case of tobacco, on the other hand, the consumer produces nothing but smoke. Mr. Pritt argued that the tax is a sales tax, and that a sales tax is indirect because it can be passed on. The ordinary forms of sales taxes are, undoubtedly, of this character, but it would be more accurate to say that a sales tax is indirect when in the normal course it can be passed on. If a tax is so devised that (as Mill expresses it) the taxing authority is not indifferent as to which of the parties to the transaction ultimately bears the burden, but intends it as a "peculiar contribution" on the particular party selected to pay the tax, such a tax is not proved to be indirect by calling it a sales tax. Previous observations by this Board as to the general character of sales taxes, or of taxes on commercial dealings, ought not to be understood as denying the possibility of this exception.

There remains, on this first head, the question whether, notwithstanding that the tax in the form (*a*) is "direct" within Mill's test, it is none the less beyond the powers of the province to impose as being in the nature of "excise" in the sense that the attempted imposition would be an alteration of the "excise laws" of New Brunswick which the provincial legislature is debarred from affecting under s. 122 of the British North America Act. "Excise" is a word of vague and somewhat ambiguous meaning. Dr. Johnson's famous definition in his dictionary is distinguished by acerbity rather than precision. The word is usually (though by no means always) employed to indicate a duty imposed on home-manufactured articles in the course of manufacture before they reach the consumer. So regarded, an excise duty is plainly indirect. A further difficulty in the way of the precise application of the word is that many miscellaneous taxes, at any rate in this country, are classed as "excise" merely because they are for convenience collected through the machinery of the Board of Excise—the tax on owning a dog, for example. Their Lordships do not find it necessary in the present case to determine whether this tobacco tax in the form (*a*) is for any purpose analogous to an excise duty, for it is enough to accept and apply the proposition laid down on behalf of this Board by Lord Thankerton in the *Kingcome* case, namely, "that if the tax is demanded from the very "persons who it is intended or desired should pay it, the "taxation is direct, and that it is none the less direct, even "if it might be described as an excise tax" (1). In the course of reaching this conclusion, Lord Thankerton carefully examined the only two cases which might be thought to contain any suggestion to the contrary effect, namely, *City of Halifax* v. *Fairbanks' Estate* (2) and *Attorney-General for British Colombia* v. *McDonald Murphy Lumber Co.* (3), and pointed out that the customs or excise duties on commodities ordinarily regarded as indirect taxation referred to in the judgments in these two cases are duties which are imposed in respect of commercial dealings in commodities in such a form that they would necessarily fall within Mill's definition of indirect taxes. Their Lordships are of opinion that Lord Cave's reference in his judgment in the *Fairbanks'* case to "two separate and distinct categories" of taxes, "namely, those that are direct and those which cannot be "so described" (4), should not be understood as relieving the courts from the obligation of examining the real nature and effect of the particular tax in the present instance, or as justifying the classification of the tax as indirect merely because it is in some sense associated with the purchase of an article. With the greatest respect to the view of the Chief Justice of Canada, their Lordships are unable to take the view that a valid distinction is to be found between the directness of the tax in the *Kingcome* case (1) and the quality

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(1) [1934] A. C. 45.

(1) [1934] A. C. 45, 55.
(2) [1928] A. C. 117.
(3) [1930] A. C. 357.
(4) [1928] A. C. 124.

of the tax in the present instance on the ground that in the former case the tax was on every person who had consumed fuel oil whereas the tax in the present case is on every person who buys tobacco in order to consume it. In both instances the circumstance which makes the tax direct is the same, namely, that the person who pays the tax is the person who actually bears it, and this arises necessarily from the circumstance that purchase for re-sale is not taxed. Their Lordships, therefore, conclude that the tax in form (*a*) is valid.

Next comes the question whether the tax, though "direct" when the principal deals personally with the retail vendor across the counter, ceases to be "direct" if the purchase is made by an agent acting for his principal. Their Lordships have already pointed out that in this case also the person who bears the tax is really the principal, either because he has already given his agent the money to pay it or because he is bound forthwith to repay his agent for the expense incurred with his authority and on his behalf. This indemnification does not follow because there is any fresh transaction analogous to re-sale after the purchase by the agent has been made. It is part and parcel of a single transaction. The agent pays the tax for and on behalf of his principal. If, indeed, the agent gave the name of his principal to the vendor the contract of sale would be with the principal. If there was anything to complain of in the quality of the article it would be the principal, whether named or not, who might have a remedy against the vendor. It is said that the tax in this second form is not direct because the agent, who is personally liable for the tax and has to pay it when receiving the tobacco, is distinct from the principal who bears the burden of the duty, but, in their Lordships' opinion, this circumstance does not, according to the distinction laid down by Mill, prevent the tax from being a direct tax. There is an obvious distinction between an indirect tax, like an ordinary customs or excise duty, which enters into the cost of an article at each stage of its subsequent handling or manufacture, and an impost laid on the final consumer, as "the "particular party selected to pay the tax," who produces the money which his agent pays over. This is mere machinery, and resembles the requirement in British income tax that in certain cases A is assessed for tax which B really bears—a circumstance which does not make income tax "indirect."

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The test for indirect taxation which Mill prescribed is the passing on of the burden of a duty by the person who first pays it through subsequent transactions to future recipients in the process of dealing with the commodity, or, at any rate, the tendency so to pass on the burden. Here the position is quite different. It is really the principal who in this case also both pays the tax and bears it. Their Lordships find it impossible to suppose that, in applying the economic distinction which is at the bottom of Mill's contrast, it would be correct to call this tax "direct" if a man bought a packet of cigarettes over the counter by putting his hand in his pocket and paying price and tax himself to the vendor, but "indirect" if he stood outside the shop and gave his wife the necessary amount to get the cigarettes and pay the tax for him. It is argued that the decision of this Board in the *Grain Futures* case, *Attorney-General for Manitoba* v. *Attorney-General for Canada* (1), goes to show that a tax imposed on agents dealing in a commercial article for their principals must be indirect. Their Lordships are of opinion that the actual decision does not justify so wide and general a deduction. The tax in the *Grain Futures* case (1), as Lord Haldane pointed out, became a charge against the amount of the price which was to come to the seller in the world market, and was thus indirect. Similar considerations governed the view taken by this Board in *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ld.* (2); *Attorney-General for British Columbia* v. *Canadian Pacific Ry. Co.* (3); and *Rex* v. *Caledonian Collieries* (4). In all these instances the tax was indirect because of its tendency to affect the price paid by persons other than the taxpayer for the commodity as an article of trade. Nothing of the sort happens here. The production of the money to pay the tax by the agent is a mere piece of machinery unconnected with any subsequent commercial dealing with the tobacco. Notwithstanding that an agent is employed, it is the principal who really finds the money for the tax and he throughout bears the burden of it. Qui facit per alium facit per se. Their Lordships, therefore, take the view that the tax imposed by s. 4 of the Act is valid both in the form (*a*) and in the form (*b*).

For the same reasons, and apart from other considerations which apply only to s. 5, their Lordships are of opinion that

(1) [1925] A. C. 561.
(2) [1933] A. C. 168.
(3) [1927] A. C. 934.
(4) [1928] A. C. 358.

the tax is valid in the forms (*c*) and (*d*), but the tax imposed by s. 5 raises difficulties of a different order. It is manifest that s. 5 is enacted merely as a supplementary provision, to guard against the methods of avoidance of s. 4 which might otherwise remain available. At the same time, the validity of s. 5 must be judged according to its terms, and, if its enactment by the provincial legislature be beyond the powers of that legislature, it cannot be justified on the ground that it is needed to make the whole scheme watertight. Objection is taken to the validity of s. 5 on the alleged ground that it offends against ss. 121 and 122 of the British North America Act. When the scheme of Canadian federation is considered as a whole, the purpose and effect of these two sections seem plain enough. Previous to the date of federation, each province was a separate unit raising part of its revenue by customs duties on certain commodities imported from outside—it might even be from another province. One essential purpose of federating such units is that they should cease to maintain customs barriers against the produce of one another, and hence s. 121, supplemented by s. 123, established internal free trade from July 1, 1867, which was the date proclaimed for the Union. It was not, however, practicable to abolish provincial customs entirely on that date. Ordinary customs and excise are, as Mill's treatise shows, the classical examples of indirect taxation, and thus fell thenceforward within the exclusive legislative competence of the dominion parliament. But until the Dominion had imposed and collected sufficient taxes on its own account, it was desirable to continue to gather in the revenue arising from the customs and excise laws of the provinces (with the exception of inter-provincial import duties), though it would appear from s. 102 of the British North America Act that after federation the proceeds passed into the consolidated revenue fund of the Dominion. A dominion tariff has long since been enacted and the customs and excise laws of the different provinces have been brought to an end by dominion legislation. The question, therefore, on this part of the case, which has to be determined is whether s. 5 of the New Brunswick Act is invalid as amounting to an attempt by the province to tax in disregard of the restrictions contained in ss. 121 and 122 of the constitution. If s. 5 purports to impose a duty of customs, it is wholly invalid, and, if it denies free admission of tobacco into New Brunswick, it is invalid so far as this refers to tobacco manufactured in another province of Canada. Their Lordships have reached the conclusion that s. 5 does not impose a customs duty, and they adopt the reasoning on this point of Rinfret J. and Crocket J. The argument to the contrary is the argument that failed in the *Kingcome* case (1). Lord Thankerton pointed out the distinction in his judgment in that case when he said: "Customs and excise duties are, "in their essence, trading taxes, and may be said to be more "concerned with the commodity in respect of which the "taxation is imposed than with the particular person from "whom the tax is exacted" (2). Here the tax is not imposed on the commodity as such at all, and is not imposed on anyone as a condition of its lawful receipt. The "particular person" from whom the tax is exacted is the recipient in the province only if he is the prospective smoker, and, as Lord Hobhouse said in *Bank of Toronto* v. *Lambe* (3), "any person found "within the province may legally be taxed there if taxed "directly." Their Lordships agree with the majority of the Supreme Court that this is not a duty of customs.

Similar considerations dispose of the contention that, as applied to the recipient of tobacco manufactured in another province, the tax offends s. 121. Here again, it is important to remember the special feature of the tax that it is imposed as a direct tax on the consumer. Sect. 121 was the subject of full and careful exposition by the Supreme Court of Canada in *Gold Seal, Ld.* v. *Attorney-General for Alberta* (4), where the question arose whether the parliament of Canada could validly prohibit the importation of intoxicating liquor into those provinces where its sale for beverage purposes was forbidden by provincial law. The meaning of s. 121 cannot vary according as it is applied to dominion or to provincial legislation, and their Lordships agree with the interpretation put on the section in the *Gold Seal* case (4). Duff J. held that "the phraseology adopted, when the context is considered "in which the section is found, shows, I think, that the real "object of the clause is to prohibit the establishment of "customs duties affecting inter-provincial trade in the products "of any province of the union" (5). Anglin J. said: "The "purpose of that section is to insure that articles of the growth, "produce or manufacture of any province shall not be subjected

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(1) [1934] A. C. 45.
(2) Ibid. 59.
(3) 12 App. Cas. 575, 584.
(4) (1921) 62 S. C. R. (Can.) 424, 439.
(5) Ibid. 456.

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"to any customs duty when carried into any other province"(1). Mignault J. described the purpose of the section as being to secure that admission of the articles described should be "without any tax or duty imposed as a condition of their "admission" (2). These considerations make it clear that if s. 5 of the Tobacco Tax Act is not obnoxious to s. 122 of the British North America Act, it is also free from objection on the score of s. 121. That the tax is taxation within the province is, their Lordships think, clear for the reasons given by Taschereau J.

Their Lordships will humbly advise His Majesty that the appeal fails and that the Tobacco Tax Act, 1940, is in all respects a valid exercise of the powers of the legislature of the province of New Brunswick. The order of the Supreme Court must, therefore, be varied by omitting the words "with "the exception of the provisions thereof making the agent "liable for the tax." The appellants must pay the respondents' costs of the appeal. The interveners will, of course, bear their own costs.

Solicitor for appellants: *Duncan Morris Oppenheim.*

Solicitors for Attorney-General for Canada: *Charles Russell & Co.*

Solicitors for respondents and for Attorneys-General for Ontario, Manitoba, Saskatchewan, and Prince Edward Island: *Blake & Redden.*

Solicitors for Attorney-General for Quebec: *Lawrence Jones & Co.*

Solicitors for Attorney-General for Nova Scotia: *Burchells.*

(1) (1921) 62 S. C. R. (Can.) 466.
(2) Ibid. 470.

[HOUSE OF LORDS.]

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July 6, 8, 9; *Aug.* 4.

EARL FITZWILLIAM'S COLLIERIES COMPANY . . . . APPELLANTS;

AND

PHILLIPS (INSPECTOR OF TAXES) . RESPONDENT.

Revenue—Income tax—Profits arising from lands, tenements and hereditaments—Deduction—Liberty to let down surface—Half-yearly

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* *Present:* Viscount Simon L.C., Lord Russell of Killowen, Lord Macmillan, Lord Wright and Lord Romer.

payments to surface owner—Easement—Finance Act, 1934 (24 & 25 *Geo*. 5, *c*. 32), *s*. 21.

By s. 21 of the Finance Act, 1934: "(1.) Where rent is payable " . . . . in respect of any easement, and—(*a*) the . . . . easement "is used, occupied or enjoyed in connexion with any of the concerns "specified in rr. 1, 2 and 3 of no. III. of sch. A . . . . the rent shall "be charged with tax under sch. D and shall, subject to the "provisions of this section, be treated for the purpose of such of the "provisions of the Income Tax Acts as refer to royalties paid in "respect of the user of a patent as if it were such royalty: . . . . "(4.) For the purposes of this section . . . . (*b*) the expression "'easement' includes any right, privilege or benefit in, over or "derived from land; (*c*) the expression 'rent' includes a rent "service, rent charge, fee farm rent, feu duty or other rent, toll, "duty, royalty or annual or periodical payment in the nature of "rent, whether payable in money or money's worth or otherwise, "but does not include any of the payments enumerated in rules "1 to 6 of no. II. of sch. A. . . . ."

Under a lease executed in 1935 certain mines were demised to the appellants in consideration of rents and payments thereby reserved for a term of ninety-nine years. By cl. 2 the appellants were granted the liberty, in working the minerals, to withdraw support from the surface overlying the area, without making any compensation for damage except as thereinafter provided. Under cl. 5, in addition to certain rentals and royalties, the appellants were bound to pay half-yearly certain sums for every acre of so much of the seams of coal as had been worked in the preceding half-year, "as liquidated damages in respect of the overlying "surface . . . . let down":—

Held, that the payments were "rent" within the definition of s. 21, sub-s. 4 (*c*), of the Act.

Held, further (Lord Romer dissenting), that the leave conferred upon the lessees was an "easement" within the definition of s. 21, sub-s. 4 (*b*), of the Act, and that, accordingly, the rent paid in respect of it could not be deducted from the appellants' profits for the purposes of assessment to income tax.

Decision of the Court of Appeal [1942] 2 K. B. 92 affirmed.

APPEAL from the Court of Appeal.

The facts stated by LORD RUSSELL OF KILLOWEN were as follows: By a lease dated January 31, 1935, and made between the Earl Fitzwilliam and the appellants, the appellants became the lessees of certain mines, seams, beds, measures and strata of coal and other minerals and brick earth, fireclay and clay (therein collectively referred to as "the demised "minerals") for a term of ninety-nine years. By cl. 1 of the lease the demised minerals were demised in consideration of the rents and payment thereby reserved and the covenants therein contained. By cl. 2 it was provided that so far as the lessor could grant the same there were included in the demise and for the purposes thereof and for all other purposes connected with the due and proper working of the demised minerals and the disposing of the same, certain liberties of which the first ran thus: "To work the demised minerals and in so doing "and in working minerals under adjoining and neighbouring "lands to withdraw support from the surface overlying the "area of the demise and from any buildings or erections now "or hereafter to be erected or built thereon or for any mines "seams beds measures and strata of coal or other minerals "(other than and except such support, if any, as shall be "required to be left in pursuance of any covenant or provision "hereinafter contained or may be required to be left in "accordance with any contract or lease now existing or heretofore made or granted) without making any compensation "for damage except as hereinafter provided." By sub-cl. 1 and 2 of cl. 5 of the lease it was provided that the appellants should during the said term pay to the lessor by equal half-yearly payments on July 1 and January 1 in every year a surface rent for lands and surface works, and a certain rent in respect of coal. Sub-cl. 3 of cl. 5 ran thus: "The company "[i.e., the appellants] shall also pay on the half-yearly rent "days aforesaid or as soon thereafter as such rents can be "computed the acreage and/or footage rents in respect of the "several seams of coal hereby demised as follows—" There then followed under headings (A) (B) (C) and (D) different rents for the different seams of coal, and, under heading (E), a royalty for bricks. Then followed heading (F) the text of which was as follows: "The sum of 10*l.* for every acre of "so much of the Parkgate seam of coal and 5*l.* for every acre "of so much of each of the other seams of coal hereby demised "as shall have been worked and gotten during the preceding "half-year as liquidated damages in respect of the overlying "surface belonging to the lessor or land under which he has "the power to work the minerals and let down and shall also "pay the sum of 10*l.* for every acre of so much of the said "Parkgate seam of coal hereby demised as shall have been "worked as aforesaid under the lands coloured yellow on the "said plan no. 1 and referred to in part IV. of the first schedule "hereto Provided also and it is hereby agreed and declared "that such sums shall be payable in lieu of paying compensation for damage or injury which may be occasioned by "subsidence consequent on the winning working and getting "of the demised minerals or in the exercise of the liberties "hereby granted but not in lieu of or in satisfaction for any "damage or injury by smoke or noxious fumes arising from "or caused by any works or spoil heaps of the company." By cl. 6, where "any rent or payment" was calculated by the acre or the foot per acre, a due proportion of such rent or payment was to be paid for any fraction. By cl. 8 it was provided that, if in any half-year there should be wrought a less quantity of coal than should be equivalent to the amount of the certain rent payable, it should be lawful for the appellants in any succeeding half-year to work such extra quantities as should be sufficient to make up the deficiency "without "paying any rent or sum of money for the same." By cl. 11, sub-cl. 1, the appellants covenanted "to pay the rents and "surface damage payment hereinbefore reserved." By cl. 11, sub-cl. 11 and 12, provision was made for compensation for damage to buildings caused by the working in any seam of coal. The appellants were also lessees of other coal under an underlease from the Cartonwood Collieries Co., Ld., dated May 1, 1933, which contained similar provisions as to liberty to work the coal and withdraw support from the surface lands, and for payment of a sum per acre of coal worked as liquidated damages, such sum being payable in lieu of and in substitution for compensation for any permanent damage or injury which might be caused by subsidence or otherwise consequent on the working of the coal thereby demised. It was common ground that for the purpose of deciding this appeal the Fitzwilliam lease and this underlease might be treated as identical.

The appellants were assessed to income tax for the years 1934-35 and 1935-36 without any deduction being made in respect of the sums paid under cl. 5, sub-cl. 3 (F). The commissioners found that the right given by the lease to withdraw support from the surface was a grant of an easement within the meaning of s. 21 of the Finance Act, 1934, and that the payments made under cl. 5, sub-cl. 3 (F), of the lease, although expressed to be "liquidated damages in respect of the overlying "surface . . . . let down" were "so related to the exercise of "the right granted that they must be regarded as periodical "payments in the nature of rent in respect of the easement." Lawrence J. upheld the findings of the commissioners. The Court of Appeal, affirming Lawrence J., held that the right to let down the surface was an easement within the meaning of s. 21, sub-s. 4 (*b*), of the Act, that the payments were periodical payments in the nature of rent within the meaning of s. 21, sub-s. 4 (*c*), and that they could not be deducted from the appellants' profits for the purposes of assessment to income tax. The appellants appealed to the House of Lords.

Wynn Parry K.C. and *F. Heyworth Talbot* for the appellants. This is in effect an appeal from the decision in *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1). The payments stipulated are not "rent" within the meaning of s. 21 of the Act, and, accordingly, the condition in sub-s. 1 is not fulfilled, because, on the true construction of the documents in question and in the light of what Lord Warrington said in *Elliott* v. *Burn* (2), no rent is payable. The parties have substituted a formula in lieu of the liability which would otherwise have rested on the appellants to pay liquidated damages. By cl. 2, sub-cl. 1, they have not been given a right to withdraw support from the surface, nor is such withdrawal made lawful, but it is provided that, if support is withdrawn, certain consequences will follow. The ratio decidendi of *Elliott* v. *Burn* (2) was that no right to withdraw support was given. There and in *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1), the material provisions were substantially the same as in the present case. Unless this case can be distinguished from *Elliott* v. *Burn* (2) there has been no surrender of the right of support and these payments represent damages for a series of unlawful acts. If damages had been recovered at common law for those acts the Inland Revenue could not tax them. In this case the parties have at the outset of their relations commuted any possible future damages, thereby quantifying them in advance. "Compensation" in this document is equivalent to damages. Such an agreement as this cannot make that taxable which otherwise would not have been taxable. This was a bona fide agreement not formed with a view to tax evasion, and it should not be so construed that both parties are liable to tax on these amounts. The agreement is a business arrangement made for the sake of convenience and does not affect tax liability. The payments agreed to are not in the nature of rent at all, and the phrase "periodical payment in the nature of rent" in s. 21, sub-s. 4 (*c*), should not be given a wider meaning than necessary, but should be construed to some extent ejusdem generis. Even if this

(1) [1937] 1 K. B. 583.

(2) [1935] A. C. 84, 94, 95.

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payment is "rent," it is not "in respect of any easement" within the meaning of s. 21 of the Act: see the dissenting judgment of Romer L.J. in *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1), and *Elliott* v. *Burn* (2). A colliery owner must (*a*) have a lease of the coal measures, and (*b*) put himself in a position to work them without interruption, but if he has nothing more than that he is always liable to pay damages for letting down the surface. The liberty to withdraw support is not a "right, privilege or benefit "in, over or derived from land," within the meaning of s. 21, sub-s. 4 (*c*), of the Act, since the appellants already have a right of possession and occupation and a right to win and work the coal. The liberty given by cl. 2, sub-cl. 1, of the lease merely connotes that the surface owner will not seek an injunction to restrain them from letting down the surface.

Sir Donald Somervell A.-G., J. H. Stamp and *R. P. Hills* for the respondent. The liberty conferred by cl. 2, sub-cl. 1, is an "easement" within s. 21 of the Act. The lease confers a "right, privilege or benefit in, over or derived from land": *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (1). If the definition of "easement" in s. 21, sub-s. 4 (*b*), extends the meaning of the word beyond the ordinary meaning in law, it can only be by bringing in contractual rights. In the definition the word "easement" is a mere label. The other words used must include contractual rights such as the present one. Apart from this extended meaning, all that *Elliott* v. *Burn* (2) actually decided was that a right or advantage of this kind is not a separate hereditament. The dictum of Lord Warrington (3) relied on by the appellants was not by him regarded as essential to his opinion. It is inconsistent with other authorities and must have been included per incuriam. The question in that case, moreover, was different from that in the present. The damages which could be recovered for letting down the surface are part of the landowner's property right and by this lease he is submitting to a limitation of it. Accordingly, the right acquired by the appellants was "in, over or derived from land." The question whether a rent is payable falls to be considered in the light of the decision of the first point. Prima facie any consideration moving to the landowner in respect of the land or any easement is a "payment in the nature of rent" within s. 21,

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(1) [1937] 1 K. B. 583, 596.
(2) [1935] A. C. 84.
(3) Ibid. 94.

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sub-s. 4 (*c*) : *Coltness Iron Co.* v. *Black* (1). This is a "periodical "payment" made in return for freedom from the danger of an injunction. The fact that it is described as "liquidated "damages" is irrelevant. Parties to a contract cannot escape tax by the words they use.

Wynn Parry K.C. in reply. By cl. 2, sub-cl. 1, of the lease no right is conferred and nothing is made legal which was previously illegal. Accordingly, no easement is created. There is merely an alteration in the procedural situation of the parties and, though a privilege may have been conferred, it is not "in, over or derived from land."

The House took time for consideration.

Aug. 4. Viscount Simon L.C. My Lords, I have had the advantage of studying the opinion which my noble and learned friend Lord Russell of Killowen is about to deliver in this appeal. That opinion completely expresses my own view of the matter, and I content myself with saying that I adopt it in its entirety. I move that the appeal be dismissed with costs.

Lord Russell of Killowen. In computing their profits for the purposes of income tax the appellants claimed that the sums paid to the lessor under cl. 5, sub-cl. 3 (F), of the lease were allowable deductions, being moneys payable as liquidated damages in respect of the overlying surface. The claim was resisted on behalf of the Crown on the ground that the payments were rent payable in respect of an easement within the meaning of s. 21 of the Finance Act, 1934, which must under the section be treated as if it were a royalty paid in respect of the user of a patent, the result of such treatment being that it is not an allowable deduction in computing profits.

The point is a fine one and depends, in my opinion, solely on the question whether the effect of cl. 2, sub-cl. 1, of the lease is that the lessee becomes, by virtue of the liberty thereby granted, the owner of an easement within the meaning of s. 21 of the Finance Act, 1934. The relevant words in that section are these : "(1.) Where rent is payable . . . . in respect "of any easement, and—(*a*) the . . . . easement is used, occupied "or enjoyed in connexion with any of the concerns specified "in Rules 1, 2 and 3 of no. III. of sch. A ; . . . . the rent shall be

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(1) (1881) 6 App. Cas. 315.

"charged with tax under sch. D and shall, subject to the "provisions of this section, be treated for the purpose of such "of the provisions of the Income Tax Acts as refer to royalties "paid in respect of the user of a patent as if it were such a "royalty: . . . . (4.) For the purpose of this section— . . . . "(*b*) the expression 'easement' includes any right, privilege, "or benefit in, over or derived from land; (*c*) the expression "'rent' includes a rent service, rent charge, fee farm rent, "feu duty or other rent, toll, duty, royalty or annual or "periodical payment in the nature of rent, whether payable in "money or money's worth or otherwise." Counsel for the appellants argued in the first place that the payments under cl. 5, sub-cl. 3 (F), of the lease did not come within the section's definition of rent. As to this I feel no doubt. In my opinion, while they might well be said to be periodical payments in the nature of rent, they certainly fall within the word "royalty." The fact that in various parts of the lease distinctions are drawn such as "rent or payment" (cl. 6), "rent or sum of money" (cl. 8) and "rents and surface damage payment" (cl. 11), seems irrelevant. If the payment is within the section's definition, the fact that the document calls it something else, or even states that it is not rent, would seem to be immaterial.

Whether the lessee is the owner of an "easement" within the section is to me a much more difficult question. However much we might wish to do so, it is not open to us to say that the liberty granted by cl. 2, sub-cl. 1, of the lease confers on the lessee an easement within the ordinary legal meaning of that word. No such hereditament has been carved out of the surface-owner's land and vested in the coalowner. The judgments and decision in your Lordships' House in *Elliott* v. *Burn* (1) prevent us from saying that there exists here such an easement. While the Crown might well have succeeded without relying on the special definition clause in s. 21 had there been no *Elliott* v. *Burn* (1), it was conceded by the Attorney-General that, in view of that decision, he was, in order to succeed, compelled to rely on the extended meaning given to the word "easement" by the definition clause in the section. Turning once more to the lease, the effect of cl. 2, sub-cl. 1, thereof is, I think, that the lessor grants to the lessee liberty to work the coal and to withdraw support (except as mentioned) without making any compensation except the sums payable under cl. 5, sub-cl. 3 (F). While I think that

(1) [1935] A. C. 84.

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Elliott v. *Burn* (1) is an obstacle in the way of my holding that the lessee has any right in, over or derived from the surface land, or any benefit or privilege in or derived from the surface land, it is in my opinion, notwithstanding the powerful dissenting judgment of Romer L.J. in *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (2), possible to say that cl. 2, sub-cl. 1, of the lease confers on the lessee a privilege over the surface land, namely, the privilege that, by paying the sums mentioned in cl. 5, sub-cl. 3 (F), the lessee obtains freedom to work the coal without any fear of being stopped by injunction from causing subsidence to the surface land, or having to pay damages by reason of any such subsidence.

I am, accordingly, prepared to hold that the sums paid under cl. 5, sub-cl. 3 (F), of the lease are rent payable in respect of an easement within the meaning of s. 21 of the Finance Act, 1934, and I would dismiss the appeal.

My Lords, my noble and learned friend LORD MACMILLAN authorizes me to say that he concurs in the opinion which I have read.

LORD WRIGHT (read by LORD RUSSELL OF KILLOWEN). My Lords, this appeal involves the true construction of s. 21 of the Finance Act, 1934, as applied to the circumstances of the case. The trial judge, Lawrence J., and the Court of Appeal rightly held themselves bound to follow a previous decision of the Court of Appeal, *Inland Revenue Commissioners* v. *New Sharlston Collieries Co., Ld.* (2), which had not come before this House on appeal. Your Lordships have now to consider whether that case was rightly decided. This appeal has proceeded on the assumption that the circumstances of the present case are indistinguishable in principle from those of the *New Sharlston* case (2). It has also been assumed by both parties that the material facts in both these cases are indistinguishable in principle from the facts in *Elliott* v. *Burn* (1).

The facts of the present appeal have been fully stated and I do not now repeat them. It is enough to say that the appellants are the lessees of certain collieries and that the demise includes (inter alia) liberty to work the demised minerals and in so doing to withdraw support from the overlying surface without making any compensation for damage except

(1) [1935] A. C. 84.

(2) [1937] 1 K. B. 583.

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as provided in the lease. The lease stipulated for certain half-yearly payments described as rents, namely, a surface rent, a certain yearly rent, in respect of the coal gotten in the Parkgate seam, certain other rents described as acreage and/or footage rent in respect of other seams. Finally, by cl. 5, sub-cl. 3 (F), the lease provided (without using the word "rent" in that context) for certain payments in respect of every acre of the coal demised as should have been worked or gotten during the preceding half-year "as liquidated damages in "respect of the overlying surface . . . . let down." It was provided also that such sums should be payable in lieu of paying compensation for damage or injury occasioned by subsidence consequent on winning the demised minerals or in consequence of the exercise of the liberties granted by the lease. Damage due to smoke or noxious fumes caused by any works of the appellants was excepted. There was also a further lease which raised the same questions.

The issue in this appeal is whether, as between the appellants and the respondent, the inspector of taxes, the payments provided by cl. 5, sub-cl. 3 (F), were to be treated in the assessment of tax as payments of "rent" in respect of an "easement" within s. 21 of the Finance Act, 1934. Before your Lordships it has been conceded and assumed that the decision of this House in *Elliott* v. *Burn* (1) decided that no easement was actually conferred by the indenture in question in that case. Both sides have further agreed before this House in the present case, as they did in the Court of Appeal in the *New Sharlston* case (2) in respect of the lease there in question, that the lease which is now being considered is in substance and in principle indistinguishable from the lease which the House had under consideration in *Elliott* v. *Burn* (1). On this assumption, it follows on the authority of *Elliott* v. *Burn* (1) that a right of withdrawing support as an easement or incorporeal hereditament in the strict sense was not conferred on the appellants under the lease between the appellants and the lessors. The respondent's claim must, therefore, fail unless it is saved by s. 21 of the Finance Act, 1934. That section embodies in sub-s. 4 (*b*) a new statutory definition of "easement" for the purposes of the section. That definition is made applicable to certain concerns, including the collieries leased by the lessors to the appellants.

The material words of sub-s. 4 (*b*) must now be construed.

(1) [1935] A. C. 84. (2) [1937] 1 K. B. 583.

They are as follows: "The expression easement" [*sc.* for the purposes of the section] "includes any right, privilege or "benefit in, over or derived from land." Do these words take the case outside the actual or assumed ruling in *Elliott* v. *Burn* (1), and do they cover the present case? In my opinion, they do. That was so held (Romer L.J. dissenting) by the Court of Appeal in the *New Sharlston* case (2), which I think was rightly decided. The section is clearly of an amending or remedial character. It is essential to approach the construction of such an enactment without undue bias in favour of the strict law which the enactment is setting out to change. It is wrong to construe it in a niggardly and technical spirit, with an eye fixed on the old law. If it is approached in that spirit, it may be easy to eviscerate the enactment and deprive it of any effect. At the same time, its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the section read as forming part of the income tax legislation. The actual words of sub-s. 4 (*b*) are not words of art or such as a conveyancer would use. They are popular in character. They do not suggest the idea of an easement in the strict legal sense of an incorporeal hereditament or of an estate or interest in land. The words, in my opinion, would be satisfied by a merely personal right, privilege or benefit, so long as it concerns or affects a piece of land. So far as the fair meaning of the words requires, such a right, benefit or privilege might be created by deed or by simple contract. The definition seems to me to be inconsistent with the idea of its being limited to what could properly be called an estate or interest in land. The word "any" preceding "right, privilege or benefit," points in the direction of a wide construction. I do not wish to attempt to exhaust what the definition would cover, because I can conceive some borderline cases, but I am satisfied that the new statutory definition of "easement" includes more than the rights which this House held in *Elliott* v. *Burn* (1) not to be an easement in the strict legal sense, and that it includes whatever right or privilege over the lessors' land is given by the lease here in question. That, at least, includes that the appellants are granted an immunity from an action for an injunction or for any damages beyond the agreed periodical payments which are to frank whatever the appellants do in the course of working the mine

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in the way of letting down the lessors' surface land. The appellants get at least this qualified right or privilege in regard to withdrawing support. He cannot be restrained from doing so, nor can he be held liable in damages (except for the special excepted items) beyond the stipulated periodical payments, which are described as liquidated damages. I agree with the conclusion at which the present Master of the Rolls arrived in the *New Sharlston* case (1), where he states that the lessee had acquired an easement within the definition in the sub-section in that they were granted "the right to act in such a way as to "affect the physical condition of the surface without exposing "themselves to the operation of certain of the legal remedies "which would otherwise have been available to the surface "owners," and that that constitutes an "easement" within the language of the definition clause, having regard to the fact that it uses words of general import and not technical expressions. I agree with his further conclusion that the same meaning applies to the present case. In my opinion, the appellants were granted at least a "privilege over" the lessor's overlying land, that is in respect of the land, and this, I think, satisfies the new statutory definition.

There remains the further question whether the payments under cl. 5, sub-cl. 3 (F), are "rent" within the definition of the Act. That definition is very wide. It includes (inter alia) a "royalty or annual or periodical payment in the nature of "rent": s. 21, sub-s. 4 (*c*). In my opinion, the payments in question come within the definition as being periodical payments in consideration of the enjoyment by the appellant company of the "easement" which, in my opinion, was conferred by the lease. That is my opinion when I look at the substance of the matter and disregard the mere language of cl. 5, sub-cl. 3 (F). The description of these payments as liquidated damages cannot, in my opinion, prevent the respondent from insisting on their true character, if they come, as in my opinion they do, within the definition of rent given in the sub-section. The Crown's right to tax cannot be affected by the mere words which the parties have chosen to use. The word "rent" is itself a word of very wide import, not always correctly employed in ordinary current user, particularly in taxing provisions. "Rent" at common law, in its strict sense, could not properly be applied to denote a rent reserved in a lease of incorporeal hereditaments because rent would

(1) [1937] 1 K. B. 612.

not issue out of the premises: *Buszard* v. *Capel* (1), but such payments would ordinarily be called rent. In *Coltness Iron Co.* v. *Black* (2), Lord Blackburn observes on the use which he says is perhaps not quite accurate of the term "rent "reserved in a mineral lease," to describe what in one sense is payment by instalments of the price of minerals forming the land. In s. 21 "rent" is so defined as to include the periodical payment to be made in respect of any easement within the meaning given in the section. "Royalty" is also included as an alternative category. I think that the periodical payment in this case comes within the statutory definition. It follows that it cannot be deducted by the appellants in computing their annual profits or gains because by s. 21, sub-s. 1, of the Act of 1934 it is to "be treated for the purpose of so "much of the provisions of the Income Tax Acts as refer to "royalties paid in respect of the user of a patent as if it were "such a royalty." It is, accordingly, caught by r. 3 of the rules applicable to sch. D, cases I. and II. I would dismiss the appeal.

LORD ROMER. My Lords, in my opinion, the Court of Appeal were unquestionably right in holding that the payments specified in sub-cl. 3 (F) of cl. 5 of the lease of January 31, 1935, are rents within the meaning of s. 21 of the Finance Act, 1934. The fact that they are expressed to be payable "as liquidated damages" and "in lieu of paying compensation "for damage or injury which may be occasioned by subsidence" seems to me to be quite immaterial. It cannot alter the essential nature of the payments, which is plainly that of additional royalties. A horse may be accepted in discharge of a claim to damages. Nevertheless, it remains a horse.

But I cannot agree with the Court of Appeal that the "rent" is payable in respect of an "easement" within the extended meaning given to that word by sub-s. 4 (*b*) of the section. In forming an opinion upon this question it is essential to rid one's mind of the feeling that the appellants have acquired some sort of right to work the coal demised to them without leaving pillars or taking other means to support the overlying surface, even though they may not have acquired an easement in the strict sense of the word. The feeling is a very natural one, seeing that cl. 2, sub-cl. 1, of the lease purports in express terms to confer upon the appellants

(1) (1828) 8 B. & C. 141.
(2) 6 App. Cas. 315, 335.

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liberty to work the demised minerals and in so doing to withdraw support from the surface. But loyalty to the decision of your Lordships' House in *Elliott* v. *Burn* (1) demands that this feeling should be sternly repressed. Either the appellants have obtained by the lease an easement in its strict sense or they have no right of any kind to let down the surface. There is no room for any other alternative. *Elliott* v. *Burn* (1) compels us to hold that no such easement was granted, and it necessarily follows that, if the appellants so work their coal as to cause a subsidence of the surface, they will be committing a wrongful act, and one that is neither permitted nor condoned by anything that is comprised in the lease. Now, were it not for the provisions of cl. 5, sub-s. 3 (F), of the lease any such method of working the coal could have been restrained by injunction and any damage caused to the lessor by such method of working could have been recovered by him in an action at law. In view of the sub-clause these remedies are not open to the lessor; but I am unable to understand how the sub-clause can be said because of that to confer any right or privilege upon the lessees. It certainly gives them no right or privilege of working the coal without leaving or providing means of support to the surface. Any such working will be, as I have already pointed out, a wrongful act that is in no way sanctioned by the provisions of the sub-clause. Those provisions indeed amount to no more than this: that in lieu of his remedies by injunction and action at law the lessor agrees to accept certain additional royalties as his remedy for the wrong done to him by the lessees in depriving his surface of support. Whether or not he has thereby conferred a benefit upon the lessees time alone can show. The damages that would but for the sub-clause have been payable to the lessor by the lessees in respect of subsidence might well have been less than the total additional royalties paid in lieu of such damages. It might well happen too that the loss to the lessees by leaving pillars of coal and the cost to them of any other steps taken to prevent subsidence of the surface would together have amounted to less than the total amount of such royalties. But assuming that it turns out to have been a benefit to the appellants to pay the royalties in lieu of being compelled so to work their coal as not to let down the surface, I fail altogether to understand how that benefit can be said to be a benefit in, over or derived

(1) [1935] A. C. 84.

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from the land. It can certainly be regarded as a benefit derived from the lessor. But with all respect to those of your Lordships who think otherwise, it does not seem to me to have anything whatsoever to do with the land. I have only one other observation to make upon this topic. The court does not grant an injunction to restrain the commission of a threatened wrongful act if it appears that damages will provide an adequate remedy for the act if committed. Were the court for this reason to refuse an injunction to restrain a colliery lessee from causing subsidence to some part of the surface, it would I think be much surprised if it were told that it had conferred a benefit on the lessee in, over or derived from that surface.

My Lords, I have so far dealt only with the position that arises under the lease of January 31, 1935. The position under the sub-lease of May 1, 1933, is, we are told, the same in all material respects. I need not therefore consider it further. For myself, I would allow the appeal.

Appeal dismissed.

Solicitors for appellants: *Andrew, Purves, Sutton & Creery, for Newman & Bond, Barnsley.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

F. H. C.

[HOUSE OF LORDS.]

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1943
Mar. 8; *July* 26, 27; *Aug.* 5.

TRITONIA, LIMITED, AND OTHERS . . APPELLANTS;

AND

EQUITY AND LAW LIFE ASSURANCE SOCIETY . . . . RESPONDENTS.

House of Lords—Practice—Company—Representation by counsel.

Where an appeal is argued before the House of Lords no one has any right of audience except counsel instructed on behalf of a party, or, when the litigant is a natural person, the party himself. Accordingly, a corporation cannot be heard otherwise than by counsel. The practice of hearing agents before the Appeal Committee does not relate to the argument on the substantive appeal and does not constitute an exception to this rule.

Nairn v. *University of St. Andrews* [1909] A. C. 147 and *Douglas* v. *Pirie* (Unrep. November 17, 1913) explained.

**Present:* VISCOUNT SIMON L.C., LORD ATKIN, LORD THANKERTON, LORD MACMILLAN and LORD CLAUSON.

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APPEAL from the Court of Session.

In 1937 the respondents advanced 10,000*l.* to the first appellants, Tritonia, Ld. The third appellant, Louis Blair, a director of the company and a solicitor practising in Glasgow, entered into a personal obligation to repay the loan, undertaking to make half-yearly payments of 1000*l.* in reduction of the principal sum until the whole was repaid and to meet the stipulated interest as it accrued. In security for the loan, the second appellants, Greig & Millar, Ld., of which the third appellant was also a director, disponed to the respondents heritable property belonging to them. The debtors being in default, the respondents presented a petition under the Courts (Emergency Powers) (Scotland) Act, 1939, for leave to realize the security and exercise all the other rights, powers, privileges and remedies which were competent to them, including the doing of diligence on the joint and several personal obligations of the first and third appellants. The Lord Ordinary having granted leave to proceed as craved, his decision was affirmed by the Second Division of the Inner House. The appellants appealed to the House of Lords. On March 8 the appeal came before the House, and the third appellant stated that he appeared as an appellant in person and also that he was authorized by resolution of the directors of the appellant companies to appear on their behalf. The House intimated that the companies must appear by counsel and granted an adjournment accordingly (1). The hearing was resumed on July 26.

Hanworth for the appellant companies.

The third appellant in person.

Clyde K.C. and *R. S. Johnston* (of the Scottish Bar) for the respondents.

The House took time for consideration.

Aug. 5. VISCOUNT SIMON L.C. My Lords, there are three appellants in this case, namely, (1.) Tritonia, Ld., (2.) Greig & Millar, Ld., and (3.) Mr. Louis Blair, who is a solicitor practising in Glasgow. On March 8, on the appeal being called on, Mr. Blair came to the bar of the House and indicated his intention not only to argue on his own behalf in person (which, of course, he was entitled as a party to do) but also to argue on behalf of the two other appellants. He read to us resolutions of the boards of these two companies appointing him their agent for the purpose. It was pointed out to Mr. Blair that his right to be heard on behalf of the two companies did not depend merely on whether they had authorized him to argue on their behalf, but depended on the rule and practice of the House governing representation of a party on the argument of his appeal.

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(1) [1943] W. N. 63.

When an appeal is argued before the House of Lords, no one has any right of audience except counsel instructed on behalf of a party or (when the litigant is a natural person) the party himself. In the case of a corporation, inasmuch as the artificial entity cannot attend and argue personally, the right of audience is necessarily limited to counsel instructed on the corporation's behalf. An apparent exception to these rules arises in the case of the Appeal Committee whose practice, except when dealing with petitions for leave to appeal (presented pursuant to the Administration of Justice (Appeals) Act, 1934) is to hear agents and not counsel, as stated in para. 23 of the Directions to Agents which are a summary of procedure issued by the Parliament Office and in no way binding on the committee who have on some occasions allowed counsel to be heard. The practice of hearing agents, which can be traced back to 1813 when an order was made for agents to attend the committee, has never been embodied in a standing order of the House, and, relating as it does only to incidental petitions and other matters dealt with by the committee and not to the argument on the substantive appeal, cannot be held to constitute a real exception to the long established rule that an appeal cannot be argued on behalf of a party by any one except the party himself (if not a corporation) or by counsel.

Our attention has been called by the authorities of the House to the course taken on two previous appeals in which it might at first sight appear that there was a departure from this rule, and, indeed, the entries in the Journals of the House almost suggest it. But, rightly understood, these precedents give no support to Mr. Blair's claim to argue on behalf of the appellant companies. The appeal of *Nairn* v. *University of St. Andrews* (1) was the appeal of four women graduates of the University of Edinburgh who claimed as such graduates the right to vote in the election of the Parliamentary representative of that university. The appeal

(1) [1909] A. C. 147.

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was argued by two of these ladies in person, and the order of the House dismissing the appeal recites that, when counsel were called in, "no counsel appearing for the said appellants, "Miss Jessie Chrystal Macmillan and Miss Frances Helen "Simpson (two of the said appellants) were heard at the bar "on behalf of themselves and the other appellants." The situation there was, however, that each of the four ladies had identically the same case. If one succeeded they all succeeded. Strictly speaking, each of the two ladies named argued her own case, and, since the House does not permit multiplicity of argument from each of a list of appellants who are all making the same contention, the argument of the two ladies named sufficiently presented the case which each of the four were present to make. Similarly, in the appeal of *Douglas* v. *Pirie* (1), heard on November 17, 1913, when no counsel appeared for the appellants, one of them, a lady, is described in the Lords Journal as being "heard at the bar "on behalf of herself and the other appellants." This also is not an accurate expression. There were three appellants who were trustees under a will, and the contention raised by the lady who argued was exactly the same as that which would have been raised by or on behalf of her co-trustees. Strictly speaking, she was arguing on her own behalf, and this also is no departure from the well-established rule that argument at your lordships' bar on behalf of one individual by another is only permitted if that other is briefed as counsel. Such a rule, limiting a right of audience on behalf of others to members of the English or Scottish or Northern Irish Bars, secures that the House will be served by barristers or advocates who observe the rules of their profession, who are subject to a disciplinary code, and who are familiar with the methods and scope of advocacy which are followed in presenting arguments to this House.

Your Lordships, accordingly, refused to hear Mr. Blair on behalf of the two appellant companies, but granted an adjournment in order that the companies might, if so advised, instruct counsel to represent them. On the appeal again coming before the House on July 26 counsel appeared on behalf of the two appellant companies and Mr. Blair appeared solely on his own behalf. The position having thus been regularized, the hearing proceeded and counsel was heard on behalf of the two companies and Mr. Blair was heard for himself. [His

(1) Unrep. Nov. 17, 1913.

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lordship, having held, on the facts, that the first and third appellants had failed to make out a case for the exercise of the court's discretion in their favour, held, further, that the case of the second appellants did not fall within s. 1, sub-s. 3, of the Courts (Emergency Powers) (Scotland) Act, 1939, inasmuch as a person not liable to perform an obligation was not entitled to invoke the statutory relief.]

My Lords, my noble and learned friends LORD ATKIN, LORD THANKERTON and LORD MACMILLAN desire me to say that they concur in this opinion.

LORD CLAUSON. My Lords, I also concur in the opinion which has been tendered to your Lordships by the noble lord on the woolsack.

Appeal dismissed.

Solicitors for appellants: *Ince, Roscoe, Wilson & Glover, for Manuel Menzies & Paton, W.S., Edinburgh, and Symington & Blair, Glasgow.*

Solicitors for respondents: *Rooper & Whately, for Murray, Beith & Murray, W.S., Edinburgh.*

[PRIVY COUNCIL.]

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Aug. 5.

MATTOUK . . . . APPELLANT;

AND

MASSAD . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Seduction—Competency of action—Proof of rape.

Appeal—More detailed statement of reasons for judgment by trial judge after appeal—Undesirable practice.

Although the action for seduction is normally based on an act of the defendant which is wrongful only as against the master and is neither actionable at the suit of the servant nor criminal, yet it may, as may any other action brought by a master for being wrongfully deprived of the service of his servant by the defendant, be based on an act which is both a tort against the servant and a felony. Proof, therefore, that the defendant to an action of seduction had intercourse with the servant against her will and was therefore guilty of the felony of rape, is no bar to the master's right to recover damages for the loss of the servant's service thereby occasioned.

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* *Present*: LORD ATKIN, LORD THANKERTON, LORD PORTER, LORD CLAUSON and SIR GEORGE RANKIN.

Opinion to the contrary by the West African Court of Appeal dissented from, though its judgment was affirmed on the facts.

A trial judge should not send a more detailed statement of the reasons for his judgment to the officials of the Court of Appeal after the hearing and decision of an appeal.

APPEAL (No. 27 of 1942) from a judgment of the West African Court of Appeal (June 7, 1941), which reversed a decision of Fuad J., sitting in the Divisional Court for Ashanti of the Supreme Court of the Gold Coast (October 5, 1940).

The following facts are taken from the judgment of the Judicial Committee: The action out of which this appeal arose was brought by the appellant against the respondent for the seduction of his daughter, Mary, by the respondent. The parties were Syrians, living at Kumasi. Mary lived with her parents and younger children in a flat above some shops. The appellant worked in a store at Kumasi, and his wife worked at a shop of her own. Mary, who, apparently, was a well developed girl of 15 at the material date, gave evidence for the appellant and deposed that the respondent and his wife used to visit her parents frequently. The respondent, aged 42, was a leading man in the Syrian community, and had recently married a young wife of 17, who had a baby born on September 4, 1939. Mary deposed to various occurrences, the first being in October, 1939, when the respondent and his wife were present, at which, she said, the respondent had followed her to another room and fondled her; another at a later date, when the same thing occurred; and the third when the respondent, his wife and Mary's mother were sitting on the verandah and the respondent exposed his person to her. Later, about November 15, the respondent, she alleged, came to the house alone, found her alone, and followed her to her parents' bedroom and there had intercourse with her against her will. She then referred to a second occasion when the respondent came again with his wife and the baby. They were on the verandah with Mary and her mother. Mary had the baby in her arms, and when it slept took it to the parents' room to lay it on the bed. As she was bending over with the baby in her arms, the respondent came behind her, put one

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hand over her mouth and had intercourse with her against her will from behind. The room had two windows, one overlooking the verandah with drawn curtains, and a door opening into the verandah with folding doors which were open but had a curtain over them. She alleged that, as the result of that intercourse, she gave birth to a child on July 24, 1940. It was for the expenses and loss of service consequent on the birth that the appellant claimed damages. The respondent gave evidence and denied the whole of the girl's story. The learned judge (Fuad J.) accepted the girl's story and gave the appellant 2000*l*. damages. It was not suggested by the appellant's counsel that there was any corroboration of the girl's evidence, or that the story of a connexion against the will of the girl should be accepted, or that the story of the second intercourse could be received as having happened in the way described. The trial judge, who tried the case without a jury, said that he had to warn himself how dangerous it was to act on the girl's evidence alone, but that, nevertheless, having watched her demeanour and that of the respondent, he came to the conclusion that she was telling the truth. The West African Court of Appeal (Kingdon (C.J. Nigeria), Petrides (C.J. Gold Coast), and Paul (C.J. Sierra Leone)) came to the conclusion that the story was wholly incredible, and entered judgment for the present respondent. They emphasized the fact that it was not even contended that the girl's story of rape was true, and were of opinion that the trial judge was thereby reduced to reconstructing a case of intercourse by consent as to which there was no evidence, and they commented on the fact that the judge's notes of his judgment did not discuss in any detail the facts of the occurrences which he found to be true. The appellant appealed.

1943. July 12, 13. *Rewcastle K.C.* and *Valetta* for the appellant. *Wallington K.C.* and *Holroyd Pearce* for the respondent.

Aug. 5. The judgment of their Lordships was delivered by LORD ATKIN, who stated the facts, and continued: Both the trial judge and the Court of Appeal attached importance to the difference between rape and intercourse with consent, and appear to have inclined to the view that proof of the former would not support a case of seduction. In the Court of Appeal, therefore, the difference between the story of rape as told and the story as accepted appeared the more significant.

In their Lordships' opinion, the members of the Court of Appeal attached, perhaps, excessive importance to the falsity of the girl's story as to rape. It is so common for young women in cases of this kind to attempt to save appearances by alleging that they were forced to consent that such a falsehood by itself does not afford a very strong ground for disbelieving a story otherwise credible, but they were on very strong ground when they dealt with the improbability of the details as narrated by the girl. As to the first occasion, when the man and the girl were in the house alone, there is nothing intrinsically improbable in the story told, but the events of the second occasion, which is supposed to have occurred within two or three yards of a verandah where the girl's mother and the man's wife were sitting, with an open door opening into the bedroom only veiled by a curtain, with details such as counsel for the appellant did not venture to put forward as true, throw the gravest suspicion on the credibility of the girl's story. It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law. In *Rex* v. *Graham* (1), on which the trial judge relied, the criminal charge had been tried before a jury. The judge had warned the jury of the danger of convicting on the complainant's story alone, but, as the jury had convicted, the Court of Criminal Appeal did not feel justified in interfering with the decision of the only tribunal of fact. In the present case, however, the Court of Appeal were judges of fact. It was a case in which in a special degree corroboration was demanded, for not only was the girl's story admittedly untruthful on the question of consent, but it was admittedly untrue as to the details of the second occasion. The Court of Appeal were, in the circumstances, completely justified in refusing to accept the story even when it came supported by the trial judge's satisfaction with the witness's demeanour. There were other circumstances, such as the girl's failure to make any complaint against the man, her repeated denials that she knew she was pregnant, and the very significant evidence of the respondent, his wife, the wife's mother, and the midwife who attended

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(1) (1910) 4 Cr. App. R. 218.

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the wife, that after her confinement on September 4 she was for forty days unable to leave the house, and of the first three of them that she did not leave the house with or without the baby in October and November. Their Lordships, therefore, are satisfied that the judgment of the Court of Appeal was just, and that this appeal should be dismissed.

They wish to add that there seems to have been some misapprehension on the question referred to, whether proof of rape is inconsistent with seduction. The father's or master's cause of action is for the loss of the girl's service, and it seems illogical in the extreme to suppose that he could recover if the girl yielded, but not recover if he lost the service because the girl was forced. In one of the earliest cases, *Norton* v. *Jason* (1), the declaration was in trespass on the case that the defendant assaulted and carnally knew the plaintiff's daughter per quod etc. The case turned on the point that, although the daughter had lost her cause of action in trespass by reason of limitation (then four years), the father retained his independent action in case with a longer period of limitation. The fact is that in the case of rape the master would have precisely the same action, basing it on the wrong done to his servant, as in the case of any tort to the servant by which the master was deprived of her service. The action can be brought for seduction whether based on the special wrong done to the master by persuading the girl to have intercourse, or on the wrong done to the girl by the felony of rape by which the master suffered damage. It has also been decided that the fact that the wrong to the servant was a felony has no bearing on the master's action: *Osborn* v. *Gillett* (2), where the alleged felony was manslaughter.

Their Lordships cannot pass over what appears to have been an unfortunate proceeding of the trial judge in sending to the chief registrar of the Supreme Court of the Gold Coast after the hearing and decision of the appeal what purports to be a more detailed statement of his reasons for the judgment as delivered by him. It is not clear at what stage these notes were prepared. The learned judge says they were intended for the assistance of counsel for the defence, but there can be no doubt that part of the note must have been prepared after the criticism of the Court of Appeal on the absence of any detailed reference to the evidence. However well meaning the intention, it appears to their Lordships that any practice

(1) (1653) Style 398.

(2) (1873) L. R. 8 Ex. 88.

of preparing such a note and placing it on record after appeal is objectionable, and it is to be hoped that it will not be repeated.

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Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellant must pay the costs of the appeal.

Solicitors for appellant: *A. L. Bryden & Co.*
Solicitors for respondent: *Layton & Co.*

[HOUSE OF LORDS.]

WORTHING CORPORATION . . . . . APPELLANTS;
AND
SOUTHERN RAILWAY COMPANY AND OTHERS . . . . RESPONDENTS.

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July 12, 13, 15, 16;
Aug. 5.

Rates—Railway—Amendment of current valuation list—Proposal made after end of first railway quinquennial period, but before completion of second valuation roll—Validity—Railways (Valuation for Rating) Act, 1930 (20 *&* 21 *Geo.* 5, *c.* 24), *s.* 18, *sub-s.* 3.

By the Railways (Valuation for Rating) Act, 1930, s. 18, sub-s. 3: "The provisions of the Rating and Valuation Acts . . . . with "respect to the revision or amendment of current valuation lists "by means of proposals, supplemental lists, or provisional lists ". . . . shall not apply in the case of a hereditament for the time "being shown in the railway valuation roll as a railway heredita"ment."

On April 27, 1934, the first railway valuation roll relating to the undertaking of the respondent railway company for the period April 1, 1931, to March 31, 1936, was completed under the Railways (Valuation for Rating) Act, 1930, which introduced a separate system of rating for railways. A station owned by the respondents, part of which consisted of a coal wharf occupied by coal merchants, was entered in that roll as a "railway hereditament," and corresponding entries were made by the local assessment committee in the valuation list kept under the Rating and Valuation Act, 1925. On February 22, 1937, the appellant corporation presented a proposal to that committee under s. 37 of the Act of 1925 to amend the valuation list by separately assessing the wharf as not being a "railway hereditament" so that, as from April 1, 1936, when the first railway valuation roll had expired, the general rate for the premises could be recovered. The second railway valuation roll relating to the railway, which took effect as from that day for the five following years and did not include the wharf, was not completed till January 27, 1939:—

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* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD ROMER.

Held, that, as the first railway valuation roll was not spent, so far as concerned the classification of railway hereditaments, until the second roll was completed, the wharf was at the date of the proposal "for the time being shown in the railway valuation "roll as a railway hereditament" within s. 18, sub-s. 3, of the Act of 1930, and, accordingly, the proposal was not valid and effective and the assessment committee were precluded from hearing it.

Decision of the Court of Appeal [1942] Ch. 437 affirmed.

APPEAL from the Court of Appeal.

The first quinquennial period under the Railways (Valuation for Rating) Act, 1930, began, in relation to Worthing, on April 1, 1931 (the "appointed day," under s. 23, for the commencement of the Act in relation to places outside London), and ended on March 31, 1936, but the first railway valuation roll relating to the Southern Railway (hereinafter called the first roll) was not completed until April 27, 1934. The first roll included as part of a "railway hereditament" a coal wharf which was situated in the goods yard at Worthing railway station. The wharf was owned by the first respondents, the Southern Railway Co., and occupied by the second respondents, Hall & Co., Ld., coal merchants. The assessment committee for the Worthing area received from the railway assessment authority notice under s. 8, sub-s. 4, of the Act that the roll had been completed together with information of its contents, and under s. 12, sub-s. 1, of the Act, the values and other particulars of the coal wharf, as part of a railway hereditament, were entered by the assessment committee in their current valuation list kept under the Rating and Valuation Act, 1925. (For the purposes of the valuation lists the relevant quinquennial periods were from April 1, 1929, to March 31, 1934, and from April 1, 1934, to March 31, 1939). The roll, when completed, in fact included as railway hereditaments or parts of railway hereditaments, divers premises in different parts of the country, but mainly in London, regarding which appeals were brought by rating authorities under s. 9, sub-s. 2, of the Act to the Railway and Canal Commission on the ground that the Railway Assessment Authority had incorrectly treated them as being parts of a railway hereditament, but no appeal was brought in respect of this coal wharf. The appeals

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were taken to the House of Lords, and on May 20, 1936, the House pronounced its decision that several tenements were "so let as to be capable of separate assessment" within the proviso to s. 1, sub-s. 3, of the Act, and that, therefore, they were not railway hereditaments and were rateable under the general law of rating: *Westminster City Council* v. *Southern Ry. Co.* (1). On September 24, 1936, effect was given to this decision by alterations made in the first roll when it was revised. Under s. 12, sub-s. 2, of the Act particulars of these alterations were sent to the rating authorities concerned and under s. 12, sub-s. 3, they made amendments in the appropriate valuation lists. The appellants contemplated that, as a result of the law laid down in this decision, the coal wharf would not appear in the second railway valuation roll (hereinafter called the second roll), and that, in consequence, they might be prejudiced in collecting rates on it from the actual occupiers, the second respondents, for a part or the whole of the period intervening between the date at which the second roll should have been completed, April 1, 1936, and the date at which it would be completed. On February 22, 1937, therefore, they made a proposal to the assessment committee under s. 37 of the Act of 1925 for the amendment of the current valuation list by the separate assessment of the coal wharf on the ground that it did not form part of a railway hereditament. By that date the second roll had not reached the draft stage contemplated by s. 7 of, and sch. III. to, the Act of 1930. The draft of the second roll was, in fact, settled on April 29, 1938, and the roll was completed on January 27, 1939. A second proposal to the same effect as the first was made by the appellants on March 23, 1939, after the second roll, from which the coal wharf was omitted, had been published. The validity of this proposal was not disputed, but it was conceded that it would only take effect as from April 1, 1938, and would not affect the period from April 1, 1936, to March 31, 1938, which would be covered if the proposal of February 22, 1937, was valid and effective. The appellants took out a summons under R. S. C., Or. LIV., r. 1 (*a*), asking whether the proposal of February 22, 1937, was valid and effective, and whether the assessment committee were precluded from hearing and determining the proposal. Uthwatt J. held that it was ineffective (2). The Court of Appeal (Lord Greene M.R. and Luxmoore L.J., MacKinnon L.J. dissentiente) affirming his

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(1) [1936] A. C. 511.

(2) [1942] Ch. 178.

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decision, held that in the interval between the expiration of one railway valuation roll and the completion of the next the phrase "the railway valuation roll" in s. 18, sub-s. 3, of the Act of 1930 must be taken to refer to the roll that had expired, and, as at the date when the proposal was made the premises in question were still for the time being shown on the first roll as part of a railway hereditament, the proposal was ineffective and the assessment committee were not entitled to hear it (1). The appellants appealed to the House of Lords.

Turner K.C. and *Neep* for the appellants. The proposal was valid and effective and the assessment committee had power to hear and determine it. Nothing in the Act of 1930 prohibits it. The difficulty arises from the fact that the currency of the respective quinquennial periods for the purposes of the railway valuation rolls and the ordinary valuation lists do not synchronize. The whole case turns on the construction of s. 18, sub-s. 3, of the Act of 1930 which is plain and unambiguous. When read in conjunction with ss. 3 and 17, the words in it—"railway valuation roll"—clearly refer to the second roll. The wharf was "capable of separate assessment" within s. 1, sub-s. 3. It was made obvious that it was not part of a railway hereditament by the decision in *Westminster City Council* v. *Southern Ry. Co.* (2). At the date of the proposal it was not a "railway hereditament" and its value fell to be ascertained under the Act of 1925. As soon as the first quinquennium under the Act of 1930 expired the second notionally commenced although the second roll had not been completed: see s. 3, sub-s. 2. Under s. 17 the second roll, when completed, took effect as from the beginning of that quinquennium "for all purposes." That cannot mean for all purposes except those of s. 18, sub-s. 3. There can only be one effective roll at any given time, and in February, 1937, the second roll was effective although it was not completed. The solution to such a difficulty as the present would be for the assessment committee to adjourn consideration of the proposal until the roll was completed: see sch. I., para. 3, to the Act of 1925. Though the appellants' construction would allow rating authorities to make proposals before the completion of the roll, they are responsible bodies and must be presumed to act reasonably and not to be likely to put forward obviously bad proposals. There is a distinction between imposing a liability to rates and providing machinery for their collection: Poor Relief Act, 1601; Union Assessment Committee Act, 1862; Rating and Valuation Act, 1925; Railways (Valuation for Rating) Act, 1930; Rating and Valuation (Postponement of Valuations) Acts, 1938 and 1940; Rating and Valuation Acts (Railway Valuation Roll) Rules, 1933. The Act of 1930 which, under s. 24, sub-s. 1, is to be construed as one with the Rating and Valuation Acts, is concerned solely with machinery for valuing railway hereditaments to measure the amount of the charge for rates and does not operate to relieve the occupier of a non-railway hereditament of his liability. That cannot have been the intention of s. 18, sub-s. 3. The Act should be so construed that rates can be charged continuously, for, to construe it otherwise, would result in injustice to other ratepayers. It has been suggested that the effect of the appellants' contention would be to produce chaos in rating, but that should be preferred to injustice. In fact, however, it would lead to no more than some administrative inconvenience. When the language of a statute is capable of two interpretations, one of which works manifest injustice and the other none, the latter is to be preferred: *Reg.* v. *Monck* (1). [They also referred to *Barratt* v. *Gravesend Assessment Committee* (2).]

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(1) [1942] Ch. 437.

(2) [1936] A. C. 511.

Craig Henderson K.C. and *Colin H. Pearson* for the first respondents. The Act of 1930 contemplates three stages in the preparation of the railway valuation roll:—(1.) drafting (see sch. III., para. 5, to the Act); (2.) completion (see ss. 8, 9 and 12, sub-s. 1); and (3.) revision (see ss. 10 and 12, sub-s. 2), but there is a casus omissus by reason of the unforeseen situation arising as a result of the delay in the completion of the second roll caused by the litigation in *Westminster City Council* v. *Southern Ry. Co.* (3). The Act left a gap unprovided for between the expiry of one roll and the completion of the next, for, although it was contemplated that the first roll might be late, it was expected that every subsequent roll would be ready before the expiration of the quinquennium. Whatever the consequences of the omission it is for the legislature and not the courts to remedy it: see *Gwynne* v. *Burnell* (4). If the Act had worked as anticipated this problem could never have arisen, but the machinery is so framed that by such an accident as this hereditaments may escape rating for two years. Until the Act of 1930 the term "railway hereditament" was unknown, and it was clearly the intention of the legislature to vest in the Railway Assessment Authority exclusive jurisdiction, subject to appeal, to determine whether particular premises are, or form part of, a "railway hereditament," and any question as to the valuation of a railway "hereditament." Once premises are so designated there can be no change in that designation save by the Railway Assessment Authority. The proposal of February 22, 1937, asserts that the wharf is not part of a railway hereditament, but it was already entered as such in the valuation list, and nothing in the Act authorized the assessment committee to alter that position. The ground of that proposal, namely, that the wharf did not form part of a "railway hereditament," was incapable of proof at that date, and, accordingly, the assessment committee could not lawfully entertain the proposal. When a proposal is made, there must be a grievance at that date. Therefore, the power given to the assessment committee to adjourn (sch. I., para. 3, to the Act of 1925) does not mean that they can make the relevant date later than that of the proposal. They cannot use the adjournment to wait until they are clothed with a jurisdiction which they did not possess at the earlier date. The words "the railway valuation roll" in s. 18, sub-s. 3, of the Act of 1930 refer in this case to the first roll by virtue of which the wharf was entered on the list as a railway "hereditament." That roll continued to be the roll for the purposes of the sub-section since there can be no time when there is no railway roll in existence. It did not expire until the second roll was completed. If the appellants' contention were correct they could, during the interval caused by delay in the completion of a roll, treat the Act of 1930 as inoperative and put all hereditaments into the valuation list as non-railway hereditaments. If they were right, it would lead to much labour, inconvenience and confusion.

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(1) (1877) 2 Q. B. D. 544.

(2) [1941] 2 K. B. 107.

(3) [1936] A. C. 511.

(4) (1840) 7 Cl. & F. 572, 606, 694.

Squibb for the second respondents. The whole trouble arose because a non-railway hereditament was included in the first roll and left in it on revision. If the rating authority had appealed, the hereditament would have been removed from the roll. The appellants' case is analogous to that of a man who has a good cause of action in law, but forms the

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view that he has not, and, after someone else has litigated the point, finds that he has lost his rights through having slept on them. That is the extent of the casus omissus in this case. The appellants have not made this proposal because the wharf was not part of a railway hereditament when the first roll was made, but because, in view of *Westminster City Council* v. *Southern Railway Co.* (1), it appeared that it would not be included in the second roll.

Turner K.C. in reply. There is no substance in the argument that the appellants should have appealed against the inclusion of the wharf in the first roll, for they are not now trying to go back to 1931 or alter the position as regards the first quinquennium. They rely on six points:—(1.) Prima facie this was a good and valid proposal under s. 37 of the Act of 1925 unless it is prohibited by something in the Act of 1930, i.e., s. 18, sub-s. 3. (2.) The proposal was not so prohibited, for the words "the railway valuation roll" in s. 18, sub-s. 3, mean the second roll which was in force at the date of the proposal and in which this wharf was not shown as a railway hereditament. (3.) By s. 3, sub-s. 2, the first roll has no force or effect after March 31, 1936, and by s. 17 the second roll is retrospective for all purposes to April 1, 1936. Thus the assessment committee had authority from the beginning of that quinquennium to make the proposal and the appellants could recover the general rate as a result of it. (4.) There is no question of the assessment committee acquiring by means of an adjournment a jurisdiction which they had not got. They always had jurisdiction, but they could not operate on the valuation list till the Railway Assessment Authority had notified them of the contents of the second roll. (5.) The words "the railway valuation roll" have the same meaning in s. 18, sub-s. 1, as in s. 18, sub-s. 3, and, in fact and in practice, the appellants' contention would not lead to chaos. (6.) A casus omissus should not be created by interpretation, especially when the result would be to create injustice by transferring a burden from one ratepayer to the ratepayers at large: see *Scott* v. *Legg* (2).

The House took time for consideration.

Aug. 5. VISCOUNT SIMON L.C. My Lords, I have found it difficult to arrive at a confident conclusion on this appeal,

(1) [1936] A. C. 511.

(2) (1876) 2 Ex. D. 39.

especially in view of the reasoning of MacKinnon L.J. in his dissenting judgment in the Court of Appeal and of Mr. Turner's able argument before this House. The difficulty in the case is that we have to apply the provisions of the Railways (Valuation for Rating) Act, 1930, to a situation which Parliament does not appear to have clearly visualized as likely to occur when the Act was passed. It cannot be supposed that the legislature intended that a rateable hereditament, such as this coal wharf at Worthing Station goods yard, should escape all liability for rates for two years, yet that is the result of the decision of the majority in the Court of Appeal, approved, as it will be, by the judgment of this House. We are not, of course, at liberty to write into the statute additional words in order to bring about a less surprising or inequitable result unless the addition is fairly to be implied from the actual terms of the statute. On the whole, I am in agreement with the rest of your Lordships that the appeal must be dismissed, and I can adopt the detailed analysis to which the relevant sections of the Act have been subjected by Uthwatt J., by Lord Greene M.R. and Luxmoore L.J. in the Court of Appeal, and in the opinions about to be delivered in this House, without repeating them.

The whole trouble is due to the circumstance that the second railway valuation roll (which was to be in force from April 1, 1936, to March 31, 1941) was not completed before March 31, 1938. If it had been, and if (as the Worthing rating authority correctly anticipated) the coal wharf was found not to be included in the second roll as a railway hereditament, it would have been possible for the appellants, by taking appropriate steps, to ensure that their current valuation list should have been amended as from April 1, 1936, by striking out the wharf as a railway hereditament and inserting it as a hereditament valued by the usual method of valuation for non-railway hereditaments. As a result, rates would have been payable continuously in respect of the wharf. The legislature must, I think, have proceeded on the assumption that the second railway valuation roll would be available in time to secure this result. This does not turn out to be the fact, and hence the possibility of this gap arising. All we can do is to apply the statutes as they stand, and the conclusion to which I am driven is, for reasons which others of your Lordships are stating more at length, that the proposal is not valid or effective, and that the assessment committee are precluded from hearing and determining it. I move that the appeal be dismissed with costs.

LORD RUSSELL OF KILLOWEN. My Lords, the question to be decided on this appeal is whether a proposal dated February 22, 1937, and made by the Worthing rating authority (under s. 37 of the Rating and Valuation Act, 1925) for the amendment of the current valuation list was valid and effective. The proposed amendment related to certain premises, namely, a coal wharf situated in the goods yard at Worthing railway station, occupied by the respondents Hall & Co., Ld., and owned by the respondents the Southern Railway Co. The part of the first railway valuation roll relating to the Southern Railway (which I will call the Southern Railway roll) included the coal wharf as part of a railway hereditament. The proposal asked for it to be separately assessed on the ground that it did not form part of a railway hereditament.

The first quinquennial period under the Railways (Valuation for Rating) Act, 1930, commenced, in relation to Worthing, on April 1, 1931, and ended on March 31, 1936. The relevant quinquennial period of the Worthing rating authority began on April 1, 1934, and ended on March 31, 1939. The drafting and completion of the first railway valuation roll under the Act of 1930 took a much longer time than was probably anticipated by those responsible for the statute which provided this novel method of valuing for rating purposes hereditaments occupied by railway companies. In fact the Southern Railway roll was not completed until April 27, 1934. On this completion, the assessment committee for the Worthing area (hereinafter referred to as the assessment committee) would receive the proper notice under s. 8, sub-s. 4, of the Act of 1930, with the result that, by virtue of s. 12, sub-s. 1, of the same Act, the coal wharf would appear in the valuation list relating to the quinquennial period from April 1, 1934, to March 31, 1939, as part of a railway hereditament. The Southern Railway roll, when completed, in fact included as railway hereditaments or parts of a railway hereditament divers premises in different parts of the country, but mainly in London, as to which appeals were brought by rating authorities (under s. 9, sub-s. 2, of the Act of 1930) to the Railway and Canal Commissioners, on the ground that the railway assessment authority had incorrectly treated them as being railway hereditaments or parts of a railway hereditament. No such

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appeal was brought in respect of this coal wharf. The appeals eventually reached your Lordships' House, and on May 20, 1936, your Lordships' decision was pronounced declaring that many, if not all, the premises in question had been, within the proviso to s. 1, sub-s. 3, of the Act of 1930, "so let out as "to be capable of separate assessment," and therefore could not be deemed to be or to form part of a railway hereditament: *Westminster City Council* v. *Southern Railway Co.* (1). The pendency of these appeals no doubt suspended the revision of the Southern Railway roll. It was not revised until September 24, 1936, when effect could be, and was given to your Lordships' decision, by alterations made in the roll on the revision thereof. By virtue of s. 12 of the Act of 1930 particulars of these alterations would be made known to the authorities concerned, and amendments would be made in the appropriate valuation lists by the assessment committees.

It is said that as a result of your Lordships' decision in *Westminster City Council* v. *Southern Ry. Co.* (1), it became obvious that the wharf was not part of a railway hereditament within the Railways (Valuation for Rating) Act, 1930. I would have thought that before such a conclusion was reached the facts of the particular case would require consideration in order to determine whether it was "so let out as to be capable "of separate assessment." However that may be, it was probable, or at least possible, that it was not part of a railway hereditament, and for the purpose of this case I will assume that it was obviously not part of a railway hereditament. The stern fact, however, remains that under the Act of 1930 assessment committees have no power in this respect to act on the obvious. For them the only question is: What does the railway valuation roll say? Their valuation list must echo the railway valuation roll.

I now come to the crucial question in the case. The Worthing rating authority made the proposal here in question on February 22, 1937. By that date the first railway quinquennial period had come to an end, the Southern Railway roll had been revised, the second railway valuation roll had not even reached the draft stage contemplated by s. 7 of, and sch. III. to, the Act of 1930. There is no provision in the Act of 1930 for altering a revised valuation roll after the expiration of the quinquennial period to which it applies.

(1) [1936] A. C. 511.

Section 10, sub-s. 2, forbids it. Is it open to a rating authority in these circumstances to apply by way of proposal under s. 37 of the Act of 1925 and ask an assessment committee to amend the current valuation list so as to cause premises which at the date of the application appear therein as part of a railway hereditament in the occupation of a railway to cease to appear therein as such and to appear therein separately assessed and in a different occupation, on the ground that they do not form part of a railway hereditament? My Lords, on general principles I would have thought that the answer should be "No." It is asking the assessment committee to determine a question which they have no jurisdiction to determine. If they had jurisdiction they must have had it on February 22, 1937, but they clearly had not got it then, and they cannot clothe themselves with jurisdiction by adjournments of the application.

In my opinion, the question is answered by s. 18 of the Act of 1930. By sub-s. 3 of that section it is enacted that: "The provisions of the Rating and Valuation Acts . . . . with "respect to the revision or amendment of current valuation lists "by means of proposals . . . . shall not apply in the case of a "hereditament for the time being shown in the railway valuation roll as a railway hereditament." One of the provisions so ruled out is s. 37 of the Act of 1925, if this coal wharf was "for the time being shown in the railway valuation roll as a "railway hereditament." The words "for the time being" point to some moment of time at which it must be ascertained whether a hereditament is then shown in the valuation roll as a railway hereditament. This moment of time for the purpose of this case was February 22, 1937. On that date the only roll in existence was the first roll. It is true that the quinquennial period to which it applied had come to an end. It was no longer "in force" for the purpose of fixing liability to rates, but it is, I think, a misconception to describe it as a roll "the effect of which is spent." It is the roll which was, and continued to be, responsible for the way in which the coal wharf appeared in the current valuation list. Its effect on the valuation list continues after the end of the quinquennial period, until a new roll comes into force. It was not spent on February 22, 1937, so far as concerned classification of railway hereditaments. The Master of the Rolls has shown, I think conclusively, why the same words in s. 18, sub-s. 1, must refer to the most recent valuation roll in existence, and, in my opinion, both sub-sections refer to the valuation roll responsible for the existing condition of the current valuation list. It was, however, contended that a different view must be taken by reason of the provisions of s. 17 of the Act of 1930. This section, indeed, was the foundation of the dissenting judgment of MacKinnon L.J. The section runs thus: "Any failure on the part of the "Railway Assessment Authority to complete the whole or "any part of a railway valuation roll before the date upon "which under the provisions of this Act the roll is to come "into operation, shall not of itself render the roll or any part "thereof invalid, and each part of the roll as and when com-"pleted shall for all purposes take effect as from the said date." The section is primarily directed to giving efficacy to a completed part, notwithstanding that the whole roll has not been completed, but it is said that the last sentence compels, or, at all events, enables, us to construe the words "the railway "valuation roll" in s. 18, sub-s. 3, as meaning the roll which, though not in existence at the relevant date will, when it comes into existence, "take effect" as from a date earlier than the relevant date, i.e., as meaning, in reference to the present case, the new roll which, though not in existence on February 22, 1937, did, when it was completed on January 27, 1939, "take effect" as from April 1, 1936. For myself I am unable to follow this reasoning. Section 17 merely provides that the *operative effect* of a document (which ex hypothesi does not exist on a particular date) shall, when it comes into existence, relate back to that date, but the retrospective operation of a document (even if stated to be for all purposes) cannot make it "show" or fail to "show" something on a day before it in fact came into existence. The "nunc pro tunc" theory is capable of much, but it cannot do that. For these reasons I agree with the order made by Uthwatt J., and I would dismiss this appeal.

My Lords, my noble and learned friend LORD MACMILLAN asks me to say that he agrees with the opinion which I have just read.

LORD WRIGHT (read by LORD ROMER): My Lords, the substantial question to be solved in this appeal is whether the proposal dated February 22, 1937, was, on the true construction of the Rating and Valuation Act, 1925, and the

Railways (Valuation for Rating) Act, 1930, a valid and effective proposal. It is conceded that a second proposal which was in fact made by the appellants on March 23, 1939, after the new roll in which the wharf was omitted was published, the validity of which proposal was not disputed, would only take effect as from April 1, 1938, and would not affect the two years between April 1, 1936, and March 31, 1938. On the other hand, if the proposal of February 22, 1937, was valid and effective, it would cover these two years, for which otherwise the appellants would not get any rates on the wharf either from the Southern Railway Co. or the actual occupiers. The railway company would not be liable to be rated, nor would the second respondents as occupiers, because the amendment in the valuation list would not date back to cover this period of two years.

The crucial question, therefore, is whether the proposal of February 22, 1937, was or was not valid. The answer to this question depends on ss. 17 and 18 of the Act of 1930 in view of the fact that, up to the date when the second roll was completed, and, in particular, on February 22, 1937, the wharf was still shown on the first railway valuation roll as a railway hereditament. The decision turns primarily on the true meaning of the words of s. 18, sub-s. 3, of the Act of 1930: "shown in the railway valuation roll as a "railway hereditament." That sub-section provides that the provisions of the Rating and Valuation Acts "with respect" (inter alia) "to the revision or amendment of current valuation "lists by means of proposals" shall not apply "in the case "of a hereditament for the time being shown in the railway "valuation roll as a railway hereditament." If the coal wharf at the date of the proposal was shown on the railway valuation roll as a railway hereditament, the proposal would be invalid (so it is argued) under the express words of s. 18, sub-s. 3, of the Act which I have just quoted. On behalf of the appellants it has been contended that this is not so, because there was in fact at the date of the proposal no railway valuation roll in existence. The first roll had ceased to be in force when the first quinquennial period had expired (this was said to follow from the provisions of s. 3, sub-s. 2) and the second roll had not come into existence, even though, when it was completed, it would take effect, though not for this purpose, as from the date when the first roll ceased to be in force. On behalf of the respondents it was contended that the words of s. 18, sub-s. 3, should be construed as covering the railway valuation roll in virtue of which the wharf had been entered as a railway hereditament on the list and on which at the time the wharf was actually shown, and that that roll continued to be *the* roll in that particular respect until the next succeeding roll was completed. It was also said that under the scheme of the Act there cannot be a time when there is no railway roll in existence.

I think that the language of the Act might well admit of improvement, but it has to be construed as it stands. I do not derive much help from considering whether there is here a "casus omissus," whatever that vaguely and uncertainly used expression may mean. If a court of construction can fill up what appears to be a gap in a statute by giving an interpretation to the language of the section read in the light of the context as a whole, there is nothing which can be called a "casus omissus." There is merely a problem of construction to be solved in the ordinary way. If, however, there is no relevant provision, either express or implied, there may be a gap which a court cannot supply. In the present case I think there are sufficient reasons to enable a decision to be arrived at as a matter of construction. It is not, in my opinion, true to say that a valuation roll becomes at once dead and spent at the moment when its quinquennium expires. I do not see why it should not be deemed to continue to the extent of still showing on it a hereditament as a railway hereditament for the period while the completion of the new roll is delayed. If that were not so, it would follow that there was no railway roll then in existence at all, and in that case serious administrative difficulties would arise. Merely as a matter of words, the contrast in s. 18, sub-s. 1, between "the valuation list for the time "being in force" and "a hereditament for the time being "shown in the valuation roll" is not without significance. The construction is certainly difficult and the language of the sections is not happily chosen. I have been much impressed by the reasoning of MacKinnon L.J. in his dissenting judgment in the Court of Appeal and by the able argument of Mr. Turner, but, on the whole, I prefer the reasoning of Uthwatt J., of the Master of the Rolls and of Luxmoore L.J. I may add that if, as I think, the proposal was invalid when it was made, the objection could not, in my opinion, be cured by the simple process of adjourning its consideration until circumstances arose which, if they had existed at the time when it was made, might have made it valid. I would dismiss the appeal.

LORD ROMER. My Lords, I have had the privilege of reading the opinion which has been delivered by my noble and learned friend Lord Russell of Killowen. I agree with it entirely, and concur in the motion which is before the House.

Appeal dismissed.

Solicitors for appellants: *Sharpe, Pritchard & Co., for Town Clerk, Worthing.*

Solicitor for first respondents: *H. L. Smedley.*

Solicitors for second respondents: *Braby & Waller.*

[HOUSE OF LORDS.]

ALLCHIN (INSPECTOR OF TAXES) . . . APPELLANT;

AND

COULTHARD . . . . RESPONDENT.

H. L. (E.)*
1943
June 22, 24, 28, 29; *July* 1, 2, 5, 6; *Aug.* 5.

Revenue—Income tax—Local authority—Interest on loan for general purposes—Payment out of general rate fund—Retention of tax—Profits of undertaking included in fund—"Profits or gains brought "into charge to tax"—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *All Schedules Rules, rr.* 19, 21—*South Shields Corporation Act,* 1935 (25 *&* 26 *Geo.* 5, *c. xcvi.*), *ss.* 112, 113, 114, 115, 116.

By r. 19, sub-r. 1, of the All Schedules Rules of the Income Tax Act, 1918: "Where any yearly interest of money . . . . is "payable wholly out of profits or gains brought into charge to "tax, no assessment shall be made upon the person entitled to "such interest . . . . but the whole of those profits or gains shall "be assessed and charged with tax on the person liable to the "interest . . . . without distinguishing the same, and the person "liable to make such payment, whether out of the profits and "gains charged with tax or out of any annual payments liable "to deduction, or from which a deduction has been made, shall "be entitled, on making such payment, to deduct and retain "thereout a sum representing the amount of the tax thereon "at the rate or rates of tax in force during the period through "which the said payment was accruing due."

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* *Present:* VISCOUNT SIMON L.C., LORD RUSSELL OF KILLOWEN, LORD MACMILLAN, LORD WRIGHT and LORD ROMER.

By r. 21: "Upon payment of any interest of money . . . . "charged with tax under Schedule D . . . . not payable, or not "wholly payable out of profits or gains brought into charge, the "person by or through whom any such payment is made shall "deduct thereout a sum representing the amount of the tax "thereon at the rate of tax in force at the time of the payment. "(2.) Where any such payment as aforesaid is made by or through "any person, that person shall forthwith deliver to the Commissioners of Inland Revenue, for the use of the Special "Commissioners, an account of the payment, or of so much thereof "as is not made out of profits or gains brought into charge, and "of the tax deducted out of the payment or out of that part "thereof, and the Special Commissioners shall assess and charge "the payment of which an account is so delivered on that person."

Out of the general rate fund of the South Shields Corporation, into which were paid all their receipts, comprising both untaxed receipts and taxed receipts, which included (inter alia) receipts of their electricity and transport undertakings, the corporation paid in the year in question interest on loans, raised both in respect of those undertakings and for other purposes, to the extent of 132,396*l.*, deducting income tax therefrom in the usual way. It was admitted that of this sum not less than 40,892*l.* was not payable "out of profits or gains brought into charge," and that, accordingly, the corporation were accountable to the Crown for tax on this amount under r. 21, but they contended that the profits of the two undertakings amounting together (after payment of interest on moneys borrowed for their purposes) to 15,217*l.*, were applicable to meeting other interest payable by them. This sum, together with the other taxed receipts, made 91,504*l.*, the amount of their assessment to tax for the year in question, which they contended were the "profits or gains brought into charge "to tax" out of which the interest was payable within the meaning of r. 19 and for which they were not, accordingly, liable to account to the Crown. On behalf of the Crown it was contended that the profits of these undertakings should not be included, thereby reducing the amount of interest so paid to 76,287*l.*:—

Held, that the interest should be deemed to have been paid out of profits as assessed unless there was any legal impediment to so deeming, and that there was nothing in the South Shields Corporation Act, 1935, to make it illegal to use the profits from the undertakings to pay interest on moneys borrowed for general purposes.

Per Viscount Simon L.C. The proper interpretation of rr. 19 and 21 is that annual payments paid in a particular year, which, if the profits or gains brought into charge for that year were large enough, would have been properly payable thereout, are to be treated as having notionally been paid out of the payer's assessed income for that year, and the payer is to be allowed to deduct and retain the tax on the annual payments provided that the amount so deducted and retained does not exceed the amount of tax payable by him in that year on his assessed income. Any such excess he may not retain, but he must account for it to the Crown. Thus, tax is set off against tax.

Attorney-General v. *Metropolitan Water Board* [1928] 1 K. B. 833 approved, but reasoning corrected.

Decision of the Court of Appeal [1942] 2 K. B. 228, affirmed.

APPEAL from the Court of Appeal.

South Shields Corporation having raised certain loans for the purposes of their electricity undertaking and transport undertakings and for other purposes, interest was payable thereon out of the general rate fund which was a mixed fund consisting partly of taxed and partly of untaxed receipts. An assessment to income tax for the year 1935–1936 was made on the respondent, as treasurer of the corporation, under the provisions of r. 6 of the Miscellaneous Rules Applicable to sch. D to the Income Tax Act, 1918. In that year the corporation paid interest amounting in all to 132,396*l.* on the borrowed money, and on making those payments, deducted income tax at the standard rate. For the same year the profits or gains of the corporation were assessed to tax at 91,504*l.* The corporation agreed that they were liable to account to the Crown for tax deducted from interest in respect of so much of the 132,396*l.* as exceeded 91,504*l.*, namely, 40,892*l.* (as not being "payable out of profits or gains brought "into charge" within r. 21 of the All Schedules Rules), but they claimed to retain the rest. The Crown, however, contended that there was a further sum of tax deducted from interest which must be handed over, namely, tax on 15,217*l.*, which was arrived at as follows: The profits of the corporation's electricity undertaking as assessed for 1935–1936 amounted to 31,859*l.*, while the interest paid in that year on moneys borrowed for the purpose of that undertaking amounted to 19,231*l.*, the difference between these two figures being 12,628*l.* Similarly, the profits of the transport undertaking of the corporation as assessed for 1935–1936 amounted to 7778*l.*, while the interest paid in that year on moneys borrowed for the purpose of this undertaking amounted to 5189*l.*, the difference being 2589*l.*, which sum, with the 12,628*l.*, made up the 15,217*l.*, the handing over of tax on which was in dispute. On the contention of the Crown the amount of interest "payable wholly out of profits or gains brought into "charge to tax" was 76,287*l.*, i.e., the 91,504*l.* less 15,217*l.*

By s. 112, sub-s. 1, of the South Shields Corporation Act, 1935: "Notwithstanding anything contained in any other

"Act or order all moneys received by the corporation whether "on capital or revenue account including . . . . (*a*) all money "received on account of the revenue of any of the corporation "undertakings; and (*b*) interest and other annual proceeds "received on the investments forming part of any fund "accumulated on working capital or as a reserve renewals "repairs depreciation contingency insurance consolidated loans "capital reserve or other similar fund . . . . shall be carried "to and form part of the general rate fund and all payments "and expenses made and incurred by the corporation in "respect of any such undertaking or in carrying into execution "the powers and provisions of this or any other Act . . . . "shall be paid or transferred out of the general rate fund." By s. 113 separate accounts were to be kept in respect of each of the corporation's undertakings showing income and expenditure in respect of it. By s. 114 the corporation had power in certain events to apply out of the general rate fund a sum not exceeding the amount of the specified excess revenue of any undertaking in any year to certain specified purposes connected with the undertaking, including the provision of a reserve fund. By s. 115 provisions were made for the application of surplus revenue of the electricity undertaking. By s. 116, sub-s. 2, the existing statutory provisions governing the application of the revenues of the undertakings and the method of keeping their accounts were repealed.

The respondent appealed against the assessment contending "(*a*) that the whole of the interest payable by the corporation "in 1935–1936 and amounting to 132,396*l*. was payable out "of the general rate fund; (*b*) that the general rate fund was "a 'mixed fund' consisting partly of taxed and partly of "untaxed receipts, the taxed receipts being the sum of 91,504*l*. " . . . .; (*c*) that it was lawful to pay the aforesaid interest, "to the extent of 91,504*l*., out of the like amount of profits " . . . .; (*d*) that the aforesaid interest, to the extent of "91,504*l*., was, in fact, so paid or must be deemed to have been "so paid, and no earmarking of this interest in the corporation "accounts against the equivalent amount of taxed profits is "necessary to enable the corporation to retain the tax deducted "from such interest; (*e*) that the accounts of the corporation "do not show that any part of the profits . . . . had been "applied for purposes other than the payment of interest, "and that, if it were necessary (which was not admitted), the "said accounts could be rewritten as between the corporation "and the revenue so as to show all taxed profits transferred "to the general rate fund and there available for payment of "interest; (*f*) that the corporation was assessable to income "tax for 1935–1936 only on the difference between 132,396*l.* "and 91,504*l.*, namely, 40,892*l.*"

On behalf of the Crown it was contended "(*a*) that the "interest in question could not lawfully be paid out of the "taxed profits of the corporation to the extent that those "taxed profits were dedicated by statute to specific purposes "other than the payment of interest; (*b*) that the respondent "had failed to prove that the interest in question was, in fact, "paid out of taxed profits or must be deemed to have been so "paid; (*c*) that the accounts showed that it was not the "profits of the various undertakings which were paid into the "general rate fund, but the whole receipts of the corporation. "It was only when the accounts of the electricity and transport "undertakings were drawn up that it was known whether any "profits emerged. Any such profits were allocated by statute "in a set manner and were not wholly available for the payment "of interest or in relief of rates; (*d*) that even if the accounts "were re-written to show all taxed profits transferred to the "general rate fund, and all interest paid out of the general "rate fund, the taxed profits would nevertheless not be "available for the payment of interest; (*e*) that the corporation "was, therefore, assessable on 56,109*l.* which was the difference "between 132,396*l.* interest paid under deduction of tax, and "76,287*l.* taxed income remaining after the statutory charges "payable out of the taxed income had been met, and being "the amount of 91,504*l.* . . . . less the amount of 15,217*l.*, "which is not available for the payment of interest . . . . "

The Special Commissioners held that "by s. 112 of the South "Shields Corporation Act, 1935, all the moneys received by "the corporation must be carried to and form part of the "general rate fund and all payments by the corporation must "be made out of the general rate fund. The general rate fund "is a 'mixed fund' and in making payments out of this "'mixed fund' the corporation must be deemed to have paid "primarily out of taxed income unless it appears from the "evidence that the payments were not in fact paid out of taxed "income or could not be so paid because the taxed income "had been used for or dedicated to some other purposes. The "applications of money which the corporation is empowered "to make under ss. 114 and 115 of the Act of 1935, have to "be made out of the general rate fund, but not out of any "particular part of it and the form of the transport and "electricity accounts does not . . . . afford evidence that the "actual surplus income from these undertakings has been used "or earmarked for any specific purpose. We hold, therefore, "that the corporation possessed in the general rate fund a "taxed fund of 91,504*l.* out of which it could legally have "paid the interest in question, and . . . . they must be "deemed to have paid the interest primarily out of taxed "income . . . ." Lawrence J. reversed this decision on a case stated by the Special Commissioners. The Court of Appeal (Lord Greene M.R., du Parcq L.J. and Lewis J.) reversed his decision. The appellant appealed to the House of Lords.

Sir David Maxwell Fyfe S.-G. and *R. P. Hills* for the appellant. In pursuance of r. 6 of the Miscellaneous Rules of sch. D and rr. 19 and 21 of the All Schedules Rules the respondent is liable to be assessed to income tax for the amount of tax deducted from interest paid by the corporation which was not both payable and paid by them out of profits and gains brought into charge to tax. The provisions of s. 112 of the Act of 1935 do not have the effect of destroying the identity of the various undertakings or of enabling their revenues to be applied indifferently to any of the purposes of the corporation. The balance of profit of each of them must not be treated as a contribution to meet the interest on loans not raised for the particular undertaking or as being available for such a purpose, for the profits of the undertakings were dedicated by statute to specific purposes other than the payment of such interest. The taxpayer cannot be deemed to have paid interest out of profits which cannot legally be applied in payment of it or which he has deliberately debarred himself from so applying. The existence of the general rate fund is not conclusive of the present question. General rate funds existed before the Act of 1935 and similar funds existed before the Local Government Act, 1933. By the latter Act a general rate fund was constituted, but it was provided in the result that drawings therefrom could only be made in accordance with s. 194: see s. 185, sub-s. 1, and s. 194 (*a*). By the Act of 1935 the general rate fund in question here was created, subject to duties as to the use of its contents, e.g., (*a*) use of capital receipts; (*b*) if desired, the constitution of other funds; and (c) the application of revenue from the corporation's undertakings. The statutory system of operation of the general rate fund is that each of the corporation's activities should have a credit or debit in it. Thus, the electricity undertaking could claim from the fund that so much of the money in the fund is electricity surplus and it is desired to use it for electricity purposes. The effect of the judicial decisions is that one can look beyond the general rate fund and decide that sums paid out of it continue to possess their initial character (e.g. capital) or to be earmarked for a special purpose. In this case the profits of the electricity and transport undertakings brought into charge to tax were wholly used for electricity and transport purposes respectively. The present state of the law presents the inquiry: What is really paying this interest? The taxpayer fails to show that he paid or must be deemed to have paid the interest out of profits or gains brought into charge to tax (*a*) if he has deliberately used his profits and gains brought into charge to tax for a different purpose, or (*b*) if he has deliberately chosen to use different resources to pay the interest. When there is such a deliberate use of his resources the accounts cannot be re-written, nor can a new account be made out between the taxpayer and the revenue. The effect of the authorities is as follows: (*a*) *London County Council* v. *Attorney-General* (1). Lord Macnaghten and Lord Davey were contemplating a real payment of interest out of profits or gains brought into charge to tax. The examination by them of the legislation then existing shows that that legislation also presupposed a real payment. (*b*) *Attorney-General* v. *London County Council* (2). Lord Loreburn L.C. and Lord Macnaghten contemplated a real payment, and dealt with the question of double taxation. If, on looking at what happened to the income, it was found that it had been absorbed and enjoyed by the council, it could not be considered in deciding how much of the interest had been paid out of taxed funds. The reasoning of Lord Macnaghten cannot be reconciled with the proposition that it is sufficient if there is a fund in the sense of an accountancy category against which tax is charged. (*c*) *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3). Lord Atkinson contemplated a real payment. Lord Gorell

(1) [1901] A.C. 26, 34, 38, 39, 40.

(2) [1907] A. C. 131, 134, 135, 136, 137.

(3) [1910] A. C. 143, 150, 156, 158, 162, 163.

considered that one might look at the sources of the fund from which the tax was paid and that it did not matter if the money from one source passed through the general till. (*d*) *Sugden* v. *Leeds Corporation* (1). Viscount Haldane L.C., and Lord Atkinson contemplated a real payment. Viscount Haldane said that the taxed profits must not be left "practically "unaffected because of the existence of some other source of "income primarily and effectively applicable in discharge of "the burden." Lord Atkinson said that in the case of a mixed fund "you are to assume, in the absence of evidence to the "contrary, that they have been paid out of that portion of the "mixed fund out of which they should have been paid, in the "due course of administration." This connotes an inquiry as to fact. (*e*) *Dickson* v. *Hampstead Borough Council* (2). Interest was payable out of a mixed fund, and it was held that one must look and see what portion of the fund was intended to pay it and treat that portion as really having paid it. (*f*) *Birmingham Corporation* v. *Inland Revenue Commissioners* (3). Lord Buckmaster based his opinion on what the corporation said in their accounts that they actually did not do (namely, pay the interest out of taxed profits) and what they actually did (namely, pay it out of the subsidy). Lord Sumner considered that there arose the question how the payment was made. Lord Atkin on the question of fact held that the effect of the form of the account was to afford conclusive proof that the interest was paid out of untaxed funds. (*g*) *Belfast Corporation* v. *Turnbull* (4) was decided on the issue of fact, following Lord Buckmaster and Lord Atkin in the previous case. (*h*) *Fenton's Trustee* v. *Inland Revenue Commissioners* (5). There is no rule of law that payments are to be treated as made out of the taxed fund simply because there is a taxed fund which might have been used for the payment, however clear it may be that that taxed fund was not so used and that the payment of interest was made from other sources and in such shape as to be inconsistent with payment from a taxed fund. There is the further question : Were there for the relevant year profits brought into charge which were available for the interest payment or some part ?

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(1) [1914] A. C. 483, 491, 495, 499, 504, 506.

(2) (1927) 43 T. L. R. 595 ; 11 Tax Cas. 691.

(3) [1930] A. C. 307, 313, 314, 320.

(4) (1930) 15 Tax Cas. 474, 483, 484.

(5) [1936] 2 K. B. 59, 67, 68, 71, 78, 79.

When the taxpayer has elected to charge the interest payment against some other fund, such as reserve, that payment is not made out of profits or gains brought into charge to tax. (*i*) *Central London Ry. Co.* v. *Inland Revenue Commissioners* (1). The principle of *Attorney-General* v. *Metropolitan Water Board* (2) that, "whenever in any year the amount of interest "paid by the taxpayer does not exceed the amount of his "profits or gains as assessed for income tax purposes for that "year, then the interest paid in that year is, within the statutory "meaning, 'payable out of profits or gains brought into charge "'to tax,'" has not been adopted by the House of Lords. Further, the same sum of money cannot be used by different attributions to render two inconsistent services in one year. One must not exaggerate the "notionality" of taxed income. It is a real thing out of which it can be said that the interest was or was not really paid in a commercial sense. There is a parallel in the case of a trustee who has only one banking account. The legislature was not dealing with unreal moneys. "Payable" meant properly payable, i.e., out of the sum from which it was payable. The effect of the Income Tax Act, 1918, is that a taxpayer who has paid interest in a particular year out of his profits or gains cannot retain income tax deducted from it unless both the actual profits and gains of the year and the sum at which they were assessed are as great as that interest. Further, this class of case cannot be decided on a dogma about double taxation. Income is taxed again and again in its passage from one person to another. [They also referred to *Inland Revenue Commissioners* v. *Ayr Magistrates* (3); *Paton* v. *Inland Revenue Commissioners* (4); *Luipaard's Vlei Estate & Gold Mining Co.* (5) and *Gresham Life Assurance Society* v. *Styles* (6).]

Tucker K.C., *Fitzgerald K.C.* and *Donovan* for the respondent. All the revenues of the corporation must be carried to and form part of the general rate fund: s. 112 of the Act of 1935. By virtue of that section the interest payable by the corporation during the year in question was lawfully payable out of that fund alone: see also ss. 113, 114, 115 and 116. Under the Act it is lawful to use any part of the profits of the electricity and transport undertakings to pay interest on moneys borrowed

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(1) [1937] A. C. 77, 84, 89.

(2) [1928] 1 K. B. 833.

(3) 1938 S. C. 822; 22 Tax Cas. 381.

(4) [1938] A. C. 341, 361.

(5) [1930] 1 K. B. 593.

(6) [1892] A. C. 309.

H. L. (E.)
1943
ALLCHIN
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for general purposes, and the balance of profit of each of the undertakings, as measured by the assessment of them to income tax, should be deemed to have been used in paying an equivalent part of the total interest in the year of charge. The respondent adopts the two tests propounded by Lord Atkinson in *Sugden* v. *Leeds Corporation* (1), and contends that the interest was, in fact, paid out of profits or gains brought into charge, or, in the circumstances, must be deemed to have been so paid. Under the Act of 1935 it was lawful so to pay it. The general rate fund is truly a mixed fund containing within it profits brought into charge to tax and other untaxed receipts. The interest paid out of it is in law deemed to have been paid first out of the profits or gains brought into charge to tax and comprised in it so far as they will extend: *Edinburgh Life Assurance Co.* v. *Lord Advocate* (2). 91,504*l.* of the interest paid is, therefore, deemed to have been paid out of profits or gains brought into charge to tax within the meaning of r. 19. There is no necessity to draw up any accounts specifically earmarking the interest against those profits or gains to give the corporation the right of deduction and retention of tax conferred by r. 19. Any accounts drawn up by the respondent in relation to the general rate fund could, in any event, be re-written so as to show all taxed profits transferred to the general rate fund and then available for the payment of interest. When a taxpayer has paid tax on assessed profits in and for the year in which he makes a payment of interest from which he deducts tax, he will be deemed to have paid interest payable out of profits or gains brought into charge to tax if those profits equal or exceed the amount of the interest. This keeps the adjustment with the revenue within the same fiscal year. Thus, if the taxpayer has paid tax on profits amounting to X*l.* because under the Income Tax Acts there is imputed to him for that year an income of X*l.*, then, if he pays interest in that year of assessment, amounting to Y*l.*, the Y*l.* will be deemed to be paid out of X*l.* so far as that extends. If one is going to "deem," one must deem to the end. Let the profits brought into charge be the actual profits of the year. The taxpayer will be deemed to have paid any interest in that year out of the actual profits if the interest he paid was equal to or less than the computed profits: *Edinburgh Life Assurance Co.* v. *Lord Advocate* (3); *Sugden* v.

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(1) [1914] A. C. 483, 506.
(2) [1910] A. C. 143, 158.
(3) [1910] A. C. 143, 157, 161.

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Leeds Corporation (1); *Birmingham Corporation* v. *Inland Revenue Commissioners* (2); *Inland Revenue Commissioners* v. *Ayr Magistrates* (3). The only bars to deeming the payment to have been so made are (*a*) if it would have been unlawful to pay the interest out of those actual profits; (*b*) if the taxpayer has deliberately paid the interest or treated it as being payable out of something else and his doing so alters or affects rights or liabilities of third parties, including the Crown, otherwise than in its capacity as taxgatherer: *Sugden* v. *Leeds Corporation* (4) and *Birmingham Corporation* v. *Inland Revenue Commissioners* (5); or (*c*) if, on the facts, the payment is operatively payable either out of something else or by someone other than the taxpayer: *Attorney-General* v. *London County Council* (6); *Sugden* v. *Leeds Corporation* (7) and *Birmingham Corporation* v. *Inland Revenue Commissioners* (5). [They also referred to *Attorney-General* v. *Metropolitan Water Board* (8); *Brown* v. *National Provident Institution* (9); *Sterling Trust Ld.* v. *Inland Revenue Commissioners* (10); *London County Council* v. *Attorney-General* (11) and Finance Act, 1922, s. 22.]

Sir David Maxwell Fyfe S.-G. in reply. The use of income which has borne tax must be analysed, and it may be found that it is unlawful to use it to pay the interest or that it has not, in fact, been so used. The decision in *Attorney-General* v. *Metropolitan Water Board* (8) turned on a narrow point of quantification. [He referred to s. 19 of the Finance Act, 1928 and to *Fenton's Trustee* v. *Inland Revenue Commissioners* (12).]

The House took time for consideration.

Aug. 5. VISCOUNT SIMON L.C. My Lords, in substance, the question at issue is whether certain annual interest paid by the corporation during the fiscal year 1935–1936 was paid, or should be deemed to be paid, out of profits or gains brought into charge to income tax, with the result that the corporation

(1) [1914] A. C. 483, 497, 498, 499, 500.
(2) [1930] A. C. 307, 318.
(3) 1938 S. C. 822, 841, 842; 22 Tax Cas. 381, 409, 410, 411.
(4) [1914] A. C. 483.
(5) [1930] A. C. 307.
(6) [1937] A. C. 131.
(7) [1914] A. C. 483, 504, 505, 506.
(8) [1928] 1 K. B. 833.
(9) [1921] 2 A. C. 222.
(10) (1925) 12 Tax Cas. 868.
(11) [1901] A. C. 26.
(12) [1936] 2 K. B. 59, 77.

is not required to hand over to the Crown the income tax which it has deducted when paying such interest. The appellant contends that the balance of profit of each of the undertakings of the corporation is not to be treated as a contribution to meet the interest on loans not raised for the particular undertaking or as having been available for such a purpose, and that such interest could not lawfully be paid out of the profits of the undertaking inasmuch as the profits of that particular undertaking were dedicated by statute to specific purposes other than the payment of such interest. In support of these contentions the appellant refers to the well-known decision of this House in *Sugden* v. *Leeds Corporation* (1), and especially to the two tests formulated by Lord Atkinson in his speech. The respondent, on the other hand, relies on certain sections of the South Shields Corporation Act, 1935, which, as he submits, make it lawful to use any part of the profits of the electricity and transport undertakings for the purpose of paying interest on moneys borrowed for general purposes, and contends that the balance of profit of each of these undertakings, as measured by the assessment of them to income tax, should be deemed to have been used in paying an equivalent part of the total interest in the year of charge.

Before examining the South Shields Act, 1935, it is desirable to summarize the scheme of income tax collection which is now contained in rr. 19 and 21 of the All Schedules Rules and was formerly provided by s. 102 of the Income Tax Act, 1842, s. 40 of the Income Tax Act, 1853, and s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888. The former sections were the subject of analysis by Lord Macnaghten and Lord Davey in the decision of this House ordinarily referred to as the first *London County Council Case: London County Council* v. *Attorney-General* (2). The present provisions take their place without any change of substance, and the general effect may be stated under three heads, though, as will hereafter appear, there remains lurking in the language of the scheme a difficulty which does not seem to have been clearly apprehended and faced in some of the earlier authorities on this subject, but which came to the surface in *Attorney-General* v. *Metropolitan Water Board* (3). The three heads under which the existing scheme of collection of income tax embodied in rr. 19 and 21 may be stated are as follows: (*a*) A person liable to pay any yearly interest of money, annuity or any other annual payment to a recipient is not entitled to deduct this payment in arriving at his profits or gains to be assessed and charged with income tax. If the amount is payable and paid out of his profits or gains, he is assessed on a sum which includes such payments, while the recipient is not directly assessed in respect of the amount at all. Consequently, the Crown gets from the payer both the tax at the standard rate which would otherwise be due from the recipient of the annual payment and the tax due from himself in respect of what is left of his profits and gains after the payment is made. (*b*) If the annual payment is payable and paid out of his profits and gains, the payer is *entitled* to deduct from the payment he makes to the recipient income tax at the current rate, and the recipient is bound to allow the deduction on receipt of the residue and to treat the payer as acquitted of liability to him in respect of the amount thus deducted. By this means, the payer recoups himself for the tax which he has paid or will pay on the annual payment. (*c*) If and in so far as the annual payment is not payable and paid out of profits or gains brought into charge, the person making the payment is *bound* to deduct from it income tax at the current rate and to account to the Crown for the amount deducted. In effect, the payer in such a case acts as collector for the Crown of the tax due from the recipient. The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in r. 21, but must be implied. Subject to the difficulty which I am about to state, this scheme seems reasonably clear. The receiver of the annual payment is chargeable in respect of annual profits or gains arising from "all interest of money, annuities, and other annual profits "or gains" under sch. D, para. 1 (*b*), but under rr. 19 and 21 the tax is collected at the source before payment to him. If the payment is made out of the profits or gains of the payer, he is entitled to reduce his payment by the amount of the tax, but the legislature is not concerned to insist that he shall do so, as the Crown will get the tax whether he does so or not. If and so far as the payment is not made out of profits or gains, the legislature insists that the payer must deduct tax and account for it, for otherwise the Crown might not receive it.

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(1) [1914] A. C. 483, 506.
(2) [1901] A. C. 26.
(3) [1928] 1 K. B. 833.

The difficulty that remains to be solved arises from the fact that the figure at which profits or gains are assessed under cases I. and II. of sch. D are not normally the actual profits or gains of the year of charge, but a figure, formerly arrived at by averaging the profits or gains of three preceding years and now arrived at by taking those of the preceding year. Yet, if an annual payment in any year is made "out of profits "or gains," this suggests that it is made out of actual profits or gains and not out of a conventional figure arrived at from the past which is taken to represent them for taxing purposes. What, then, is the proper meaning to put on the phrase "payable wholly out of profits or gains brought into charge" in r. 19, and on the phrase "not payable, or not wholly payable, "out of profits or gains brought into charge" in r. 21? To give an illustration, if in a given year 900*l.* of interest is paid away out of profits or gains and in that year the actual profits or gains of the payer are 1000*l.*, while in the previous year they were 800*l.*, can the interest be regarded as wholly paid out of profits or gains brought into charge? The judgments of the Court of Appeal in *Attorney-General* v. *Metropolitan Water Board* (1), and in particular the judgment of Lawrence L.J. in that case, appear to take the view that the phrase the "profits or gains brought into charge" in a given year actually means the amount of the assessment for that year. If so, I cannot agree with this construction, though I agree with the result at which the Court of Appeal in that case arrived. The "profits or gains brought into charge" must, in my view, mean the actual profits of the year calculated with such deductions, additions, or allowances as the income-tax law prescribes—the 1000*l.* in my illustration. The matter is put beyond doubt, in my opinion, by observing that in r. 19 these profits or gains brought into charge "shall be assessed "and charged with tax": they cannot, therefore, be themselves the assessed figure. But I think the true solution of the difficulty is to be found by treating r. 19, while predicating a payment of interest out of actual profits, as measuring these actual profits by the figure (whether larger or smaller, or the same) of assessment of them to tax—i.e. in my illustration, the interest is deemed to be paid out of 800*l.* If, in the following year, actual profits fell off, they would nevertheless be measured by the figure of 1000*l.* This amounts to saying that tax is set off against tax, the tax deducted on paying interest against the tax charged for the same year on

(1) [1928] 1 K. B. 833.

an assessed figure of profits or gains from which the interest payment has not been deducted. This construction is in accordance with the result—though not with all the reasoning —in *Attorney-General* v. *Metropolitan Water Board* (1). It is in line with Lord Davey's observation in *London County Council* v. *Attorney-General* (2): "the mortgagor cannot, of course, "retain against the Crown more income-tax than he has paid." It is implied in Lord Macnaghten's statement in *Attorney-General* v. *London County Council* (3): "Speaking generally, "all income is chargeable, but chargeable only once. Income "is brought into charge at its source and the burden is then "distributed among the recipients of the income who bear "their share in just proportion." I agree with Lawrence L.J. in the *Metropolitan Water Board* case (4) that "under the "provisions of rr. 19 and 21 no taxpayer can retain against "the Crown any more income-tax deducted by him in any "year of assessment than he has himself paid or become "liable to pay to the Crown for that year." This, of course, includes income-tax suffered by deduction at the source. The purpose behind the rules is to avoid double taxation, as Lord Macmillan pointed out in *Central London Ry. Co.* v. *Inland Revenue Commissioners* (5). In the *Central London Ry. Co.'s* case (6) this House abstained from either affirming or dissenting from the decision of the Court of Appeal in *Attorney-General* v. *Metropolitan Water Board* (1), but I think we must now indicate a final view on the construction placed on the words "profits or gains brought into charge" by the judgments in that case. As I have already indicated, in my view the conclusion in the *Metropolitan Water Board* case (1) should be approved, but the course of reasoning by which the Court of Appeal arrived at that decision calls for correction. The phrase "profits or gains brought into charge" in a given year cannot, I think, itself mean the figure of assessment in respect of them reached when those profits or gains have been assessed and charged, but, while interest may in proper circumstances be treated as payable and paid out of these actual profits or gains, the extent to which income-tax deducted from such interest may be set off against income-tax charged on those profits or gains is to be ascertained by reference to the assessment made on the latter.

(1) [1928] 1 K. B. 833.
(2) [1901] A. C. 26, 46.
(3) [1907] A. C. 131.
(4) [1928] 1 K. B. 833, 852.
(5) [1937] A. C. 77, 81.
(6) [1937] A. C. 77.

It is to be noted that the view I have set out above is the view accepted by both sides in drawing up the case stated which provides the subject-matter for the present appeal. The Solicitor-General, if I understood him rightly, however, claimed to go further and contended that a taxpayer who had paid interest in a particular year out of his profits or gains could not retain income tax deducted from such interest unless both the actual profits or gains of the year and the sum at which they were assessed were as large as the interest paid. This would be getting the best of both worlds with a vengeance. This contention that a taxpayer cannot be treated as paying out of profits or gains unless he has enough to cover the payment both in the figure of his actual profits in the year and also in the figure of assessment of those profits is, as far as I know, novel, and I do not find anything in the Income Tax Act to support it. The proper interpretation of rr. 19 and 21 is to hold that annual payments paid in a particular year, which, if the profits or gains brought into charge for that year were large enough, would have been properly payable thereout, are to be treated as having notionally been paid out of the payer's assessed income for that year, and the payer is to be allowed to deduct and retain the tax on the annual payments, provided that the amount so deducted and retained does not exceed the amount of tax payable by him in that year on his assessed income. Any such excess he may not retain, but he must account for it to the Crown.

The remaining question is whether, in view of the South Shields Corporation Act, 1935, it was legal to use profits from the electricity and transport undertakings in order to pay interest on moneys borrowed for general purposes. This question resembles the second question formulated by Lord Atkinson in *Sugden's* case (1). I entirely agree with the Master of the Rolls in his illuminating judgment that the effect of ss. 112, 113, 114 and 116 of the South Shields Act is to make it legitimate for the corporation to do what they claim to have done. The effect of the repeal contained in s. 116 is, as Lord Greene M.R. said (2), to abolish all existing statutory regulations and restrictions as to the application of the surplus revenues of the undertakings. The result of ss. 112 to 115 is not to re-impose restrictions so as to make the decision in *Sugden's* case (3) applicable. There is no

(1) [1914] A. C. 483, 506.
(2) [1942] 2 K. B. 228, 231.
(3) [1914] A. C. 483.

scope, in view of the repeal in s. 116, for the operation in this case of s. 194 of the Local Government Act, 1933.

The result is that there would be nothing illegal in the corporation paying this interest out of the mixed fund which contains its profits or gains. Neither is there anything in the present case which goes to show that they have precluded themselves by inconsistent action (as was the case in *Birmingham Corporation* v. *Inland Revenue Commissioners* (1)) from being treated as paying the interest out of profits or gains brought into charge. The corporation claims to be so treated, and the claim is justified. I adopt in its entirety the exposition of the Master of the Rolls on this part of the case, in which he points out how limited is the assistance for the solution of this matter which can be derived from an examination of the way in which the corporation's accounts are made up and recorded. In my opinion, the appeal fails, and I move that it be dismissed with costs.

My Lords, my noble and learned friend, LORD WRIGHT, authorizes me to say that he concurs in this opinion.

LORD RUSSELL OF KILLOWEN. My Lords, I also concur in the opinion which has just been delivered by the Lord Chancellor, and I desire to add nothing thereto.

LORD MACMILLAN (read by LORD RUSSELL OF KILLOWEN). My Lords, in the fiscal year 1935-1936 South Shields Corporation paid 132,396*l*. by way of interest on borrowed money. In the same year the corporation paid income tax on an assessed income of 91,504*l*. The question is: To what extent can the 132,396*l*. be said to have been payable out of the 91,504*l*. The Crown admits that to the extent of 76,287*l*., but no more, the 132,396*l*. was payable out of the 91,504*l*. The corporation maintain that the 132,396*l*. was payable out of the 91,504*l*. to the whole extent of that sum. The controversy is thus confined to the difference between 91,504*l*. and 76,287*l*., namely 15,217*l*., on which last mentioned sum the Crown claims that it is entitled to income tax, in addition to the tax on 91,504*l*. Stated in figures that is the problem presented for solution. In law, the problem is to ascertain to what extent the interest paid by the corporation in the year of assessment was "payable out of profits or gains "brought into charge to tax" in that year within the meaning

(1) [1930] A. C. 307.

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of r. 19 of the General Rules applicable to All Schedules under the Income Tax Act, 1918.

The admission by the Crown, and, indeed, the contentions of both parties, imply that in construing the rule the relevant profits or gains are not the profits or gains of the taxpayer as actually earned in the year of assessment but the profits or gains of the taxpayer as they are assessed for income tax purposes in that year. This is tantamount to an acceptance by both parties of the result of the decision in *Attorney-General* v. *Metropolitan Water Board* (1), though not necessarily of all the reasoning on which that decision was based. I think that in the end one is driven to adopt this construction as the only practical way of making the rule work. In *Central London Ry. Co.* v. *Inland Revenue Commissioners* (2), I discussed at length the difficulties to which the wording of the rule gives rise owing to the failure of the draughtsman to appreciate that a real payment cannot be made out of notional profits. I need not traverse again that painful maze. Bluntly, I do not think that a logical solution is possible of an illogical problem. One can console oneself verbally by saying that the profits brought into tax in any year are the actual profits of that year (though there may be none) as measured by the sum at which the profits of that year are assessed, but it still remains true that actual payments cannot be made out of assessed income. Accepting, however, as I do, that for practical purposes the relevant figures to be considered, in the first place, in the case of each assessment year are (1.) the amount of interest paid by the taxpayer on borrowed money in paying which the taxpayer has deducted tax, and (2.) the sum on which the taxpayer has himself paid tax in that year, I recognize that the matter does not necessarily end there. The taxpayer may have income not subject to tax as is the case with the corporation of South Shields which has a large income from rates, and the payment of interest may have been made out of a general account to which all receipts, taxable and untaxable are carried. This case has been described as that of payment from a mixed fund. The cardinal difficulty emerges again. How can there be a mixed fund composed partly of actual receipts, e.g. from rates, and partly of notional profits or gains ? The practical solution is to deem the interest to have been paid out of the profits as assessed unless there is any legal impediment to so deeming.

(1) [1928] 1 K. B. 833. (2) [1937] A. C. 77.

This brings me to the last point which is the point expressly raised in the present case. The figure at which the taxpayer's profits for the year have been assessed and on which he has paid tax having been ascertained, is that figure further examinable? The Crown contends, and the authorities justify the contention, that it is, and that the taxpayer cannot be deemed to have paid interest out of profits which cannot legally be applied in payment of that interest or which he has by his own deliberate actings debarred himself from so applying. Again, the cardinal difficulty reappears in another form. If it is illegal for a taxpayer to use any particular part of his profits for the payment of interest on certain borrowed money it can only be the actual payment out of actual profits that is illegal. How can illegality attach to payments not actually made, but only deemed to be made out of a notional fund? The resources of judicial construction, already severely strained, must once more be invoked. Payments which could not lawfully be made out of actual profits cannot be deemed to have been made out of corresponding notional profits. The profits of the taxpayer as assessed for a particular year, although they may differ widely from his actual profits for that year, are nevertheless compiled from actual figures. If an ingredient of the profits as assessed is derived from a source which precludes the application of that ingredient to the payment of interest on borrowed money or with regard to which the taxpayer has so acted as to preclude himself from being deemed to have so applied it, then to that extent I think that the taxpayer is debarred from saying that he has paid the interest in question out of profits or gains brought into charge to tax.

In the present case the assessed profits of the corporation include profits derived from their electricity and transport undertakings. No doubt, these are, in fact, the profits of the preceding year, but they are the profits which the law attributes to the year of assessment or by which it measures the profits of the year of assessment. So far as the assessed profits of these undertakings are deemed to have been applied to the payment of interest on money borrowed for the purposes of these undertakings no question arises, but the assessed profits include surplus profits over and above the interest due on money borrowed for the purposes of these undertakings. The Crown says that these surplus profits are so dedicated by statute or otherwise have by the corporation itself been

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deliberately so applied as to preclude the corporation from maintaining that they can be deemed to have been applied in payment of the corporation's general liabilities on interest account. On this part of the case I am so entirely content with the answer which the Master of the Rolls has given to the Crown's contention that I have nothing to add. I am of opinion that on this point, which is the real point expressly raised by the stated case, the Crown fails. The appeal should, accordingly, be dismissed.

LORD ROMER. My lords, the Special Commissioners, Lawrence J., and the Court of Appeal have very properly dealt with this case on the footing that *Attorney-General* v. *Metropolitan Water Board* (1), by which they were all bound, was rightly decided. The result of this has been that neither in the case stated nor in the judgments is there to be found the figure of the actual profits or gains accruing to the South Shields Corporation from all sources in the year of assessment 1935-1936, or the balance of profit accruing to them in that year from their electricity and transport undertakings respectively after deduction in each case of the interest paid in the year on moneys borrowed for the purposes of such undertakings. All we are told is that the profits or gains from all sources in that year were assessed at 91,504*l.*, and that the balances of the sums at which the profits of the two undertakings for the year had been respectively assessed, after making in each case the deduction to which I have just referred, amounted together to the sum of 15,217*l.* But the parties appearing before your Lordships were agreed, and your Lordships were accordingly informed, that for the year in question the actual profits or gains of the corporation from all sources were not less than 91,504*l.*, and the balances of the actual profits from the two undertakings amounted together to not less than 15,217*l.* In these circumstances I am of opinion that the Court of Appeal's decision in the present case was right whether the decision in the *Metropolitan Water Board* case (1) was right or wrong, a question on which it is unnecessary to express any opinion. For I am satisfied for the reasons given by the Master of the Rolls, to which I cannot usefully add a single word, that the whole of the interest on borrowed money paid by the corporation in the year 1935-1936 could properly be paid out of the profits or gains of the corporation

(1) [1928] 1 K. B. 833.

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for that year brought into charge to tax so far as such profits or gains were sufficient for the purpose, and that such interest ought, as between the corporation and the revenue, to be treated as having been so paid in fact. I would therefore dismiss the appeal.

Appeal dismissed.

Solicitor for appellant : *Solicitor of Inland Revenue.*

Solicitors for respondent : *Speechly, Mumford & Craig, for Town Clerk, South Shields.*

[HOUSE OF LORDS.]

GENERAL MEDICAL COUNCIL . . . . APPELLANTS ;

AND

SPACKMAN . . . . RESPONDENT.

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Medical practitioner—General Medical Council—Removal of name from register — Jurisdiction — Doctor co-respondent in divorce suit — Finding of adultery against him—Right of council to accept findings of Divorce Court—Re-hearing of issue of adultery—Holding of "due inquiry"—Medical Act, 1858 (21 & 22 *Vict. c.* 90), *s.* 29.

A registered medical practitioner, who was co-respondent in a divorce suit, was found by the Divorce Court to have committed adultery with the respondent therein to whom he stood in professional relationship, and a decree nisi was pronounced which was afterwards made absolute. The General Medical Council gave him notice that a meeting of the council would be held to decide whether his name should be removed from the medical register for infamous conduct in a professional respect. At the hearing he desired to call on the issue of adultery evidence which had not been called on the hearing of the petition although it was then available. The council declined to hear the fresh evidence, but accepted the decree nisi as prima facie proof of adultery, and directed that the practitioner's name should be erased from the register.

Held, that while the council was entitled to regard the decree in the divorce suit as prima facie evidence of adultery, it was bound to hear any evidence tendered by the practitioner, and that, having refused to hear such evidence, it had not made "due "inquiry" under s. 29 of the Medical Act, 1858.

Decision of the Court of Appeal (sub nom. *Rex* v. *General Medical Council. Ex parte Spackman*) [1942] 2 K.B. 261, affirmed.

**Present :* VISCOUNT SIMON L.C., LORD ATKIN, LORD MACMILLAN, LORD WRIGHT and LORD ROMER.

APPEAL from the Court of Appeal.

The facts were stated by VISCOUNT SIMON L.C. as follows: Early in 1941 Langton J., sitting in the Divorce Court, had before him the case of *Pepper* v. *Pepper* (*Spackman cited*). The original petition was that of the wife asking for her marriage to be dissolved on the ground of her husband's cruelty. The wife's allegations were supported by the evidence of the doctor who was attending her and who was the respondent in the present appeal. On this issue of cruelty, Langton J. in his judgment, said that he disbelieved the present respondent in toto, and he found against the wife. In his answer the husband alleged that his wife had frequently misconducted herself with the present respondent. The judge found that these parties had committed adultery during 1936, 1937 and 1938, and declared that this conclusion "is not, I think, "open to any reasonable doubt at all." Consequently, the learned judge granted the husband a decree nisi of divorce, with costs against the present respondent, and ordered him to pay the husband 1000*l.* damages. The decree nisi was made absolute on August 26, 1941. On October 2, 1941, a letter was written to the present respondent on behalf of the appellant council giving notice that information and evidence had been received by the council from which it appeared that "you committed adultery with Barbara Pepper, a married "woman, of which adultery you were found guilty by a "decree" of the Divorce Court, and further that "you stood "in professional relationship with the said Barbara Pepper "at all material times and that in relation to the facts so "alleged you have been guilty of infamous conduct in a "professional respect." The letter went on to give notice that the General Medical Council would meet on November 26, 1941, "to consider the above-mentioned charge against you "and decide whether or not they should direct your name "to be removed from the medical register pursuant to s. 29 "of the Medical Act, 1858." The letter requested that any answer, admission or other communication or application "which you may desire to make respecting the said charge "or your defence thereto" should be transmitted to the council twenty-one days before the day appointed for hearing. The respondent did not furnish any written answer, as he was requested to do, but he attended the meeting of the council with his solicitor, Mr. Hempson. The solicitor to the council opened the case and placed before the council a certified copy of the decree absolute. Each member of the council had been provided with extracts from the shorthand note of the proceedings in the Divorce Court, including a copy of the judgment of the learned judge. The respondent's solicitor admitted that his client stood in a professional relationship with Mrs. Pepper, but submitted that he should be allowed to call certain evidence which was not before the Divorce Court, with a view to challenging the correctness of the judge's conclusion on the issue of adultery. Mr. Hempson frankly stated that the evidence which he desired to call was available at the hearing of the petition and could with reasonable diligence have been called at the trial, and added that, if he had been then advising the respondent, these witnesses would have been called in the divorce proceedings. The legal assessor to the council pointed out that in such circumstances the Court of Appeal, in an appeal from a decision of the High Court, would not consider that there was adequate reason for allowing the further evidence to be called and that the council's practice in such cases was only to hear evidence in rebuttal if special grounds existed. Mr. Hempson explained that the witnesses he wished to call would provide corroboration of the respondent's statements at the trial which the learned judge had not accepted. After the council had deliberated in private, the president announced that the council could not accede to Mr. Hempson's submission and were not prepared to hear fresh evidence on the question of adultery. Mr. Hempson then addressed the council and called evidence in support of Dr. Spackman's high reputation. Finally, after further private deliberation, the president of the council announced that the facts alleged in the charge had been proved to the council's satisfaction, and directed that the respondent's name should be erased from the medical register. Application was then made to the King's Bench Division on behalf of the respondent for an order of certiorari to quash the direction that the respondent's name should be erased from the register, on the ground that there had been no "due inquiry" within s. 29 of the Medical Act, 1858. Viscount Caldecote C.J. and Humphreys J. were of opinion that the application failed and that the council had made "due inquiry." Viscount Caldecote said (1) that he found nothing in the proceedings of the council to shock his sense of justice. Singleton J. was of a different opinion, and

(1) [1942] 2 K. B. 261, 267.

considered that, even when a doctor was adjudged to have been guilty of adultery under a decree of the Divorce Court, the council if that finding were disputed, ought to hear evidence tendered by or on behalf of the doctor in an endeavour to establish the contrary. In the Court of Appeal, MacKinnon, Goddard and Clauson L.JJ., were unanimous in adopting the view which had been expressed by Singleton J. MacKinnon L.J. held (2) that "due inquiry" involved "a full and "fair consideration of any evidence that the accused desires "to offer, and, if he tenders them, hearing his witnesses." With this the other two lords justices agreed, and the order of certiorari was granted accordingly. The General Medical Council appealed to the House of Lords.

Harman K.C. and *D. Bartley* for the appellant council. It was after "due inquiry" within s. 29 of the Medical Act, 1858, that the council judged that the respondent had been guilty of infamous conduct in a professional respect, and, there having been "due inquiry," the court had no jurisdiction to interfere. The inquiry which the council is obliged to make is not a judicial inquiry. It must satisfy itself, but, if it does so honestly and, in a layman's sense, fairly, the court will not interfere. It is wrong to apply a legal touchstone to this issue. This is not a lis between the council and the medical practitioner, and it does not matter that lawyers would have gone a different way about the inquiry. The fact that a lawyer might think the inquiry could have been better conducted in some other way is not a reason for upsetting the council's decision and not allowing doctors to have their own way in their own house. The council is under a special difficulty in that, unlike the solicitors' disciplinary committee, it cannot administer an oath: see Solicitors Act, 1932, s. 6, sub-s. 2. The test indicated by Viscount Caldecote C.J., is right, namely: Does the decision reached offend the ordinary man's sense of justice? What better test can a lay body take of truth or falsity on an issue of adultery than the decision of a judge specially delegated by the legislature to try that kind of question. In comparison, the council is ill-qualified to decide on such a charge. If in this case it is not entitled to accept the judge's finding, that must be so in every case before it if the accused doctor denies the adultery. Since it may rely on any decision of a petty sessional magistrate in a criminal

(1) [1942] 2 K. B. 261, 273.

matter, it would be strange if it might not rely on the decision of the highest tribunal in a civil matter. The council has not confused the treatment of civil and criminal matters. It does not accept without question the verdict of the court in a civil case (e.g., it looks at the reasons behind the judge's order), but it is entitled to accept the conclusion as final except in a special case and this is not one. It can set its own bounds to its own procedure, and, when asked to reconsider an issue already considered by the court, it is well justified in applying the principle that no opportunity ought to be given to produce evidence which was reasonably available at the time of the trial: *Shedden* v. *Patrick* (1), cited in *Nash* v. *Rochford Rural Council* (2). The council was entitled to treat the conclusion of the court as to adultery as final unless the new evidence was not so available or unless there was fraud. The council's inquiry is not into adultery, but into infamous conduct in a professional respect, the investigation for which it is really fitted, and the issue is whether or not to erase the respondent's name from the register. The council is the watch dog of the public as well as that of the profession and must protect the public against abuse by a doctor of his position. On the issue which the council have to decide the finding aye or no as to adultery is only one of the preliminaries. No injustice was done here and the council's exercise of its discretion should not be disturbed. The court should not usurp the functions of this domestic tribunal or dictate its procedure: see *Maclean* v. *Workers' Union* (3); *Stuart* v. *Haughley Parochial Church Council* (4); *Rex v. Local Government Board. Ex parte Arlidge* (5); *Local Government Board* v. *Arlidge* (6); and *Board of Education* v. *Rice* (7). The cases dealing with s. 29 of the Medical Act, 1858, are *Allbut* v. *General Medical Council* (8); *Leeson* v. *General Medical Council* (9) and *Allinson* v. *General Medical Council* (10). On the nature of "due inquiry" the cases relating to clubs provide the nearest analogy: see *Labouchere* v. *Lord Wharncliffe* (11) and *Dawkins* v. *Antrobus* (12). [They referred to the Evidence Act, 1851, s. 16; Dentists Act, 1878, s. 13; Dentists Act,

(1) (1869) L. R. 1 H. L. (Sc.) 470, 545.

(2) [1917] 1 K. B. 384, 393.

(3) [1929] 1 Ch. 602, 620.

(4) [1935] Ch. 452, 462.

(5) [1914] 1 K. B. 160, 190, 191, 192, 198.

(6) [1915] A. C. 120, 132, 138.

(7) [1911] A. C. 179, 182.

(8) (1889) 23 Q. B. D. 400.

(9) (1889) 43 Ch. D. 366, 377.

(10) [1894] 1 Q. B. 750, 760.

(11) (1879) 13 Ch. D. 346.

(12) (1881) 17 Ch. D. 615, 630.

1921, s. 8; and Architects (Registration) Act, 1931, s. 7.]

Havers K.C. and *Dickens* for the respondent. In refusing to hear the witnesses tendered on behalf of the respondent or to allow him to contest the issue of adultery the council failed to make "due inquiry" as prescribed by s. 29 of the Medical Act, 1858. It is vital to ensure that the council should exercise its powers strictly in accordance with that Act, especially as there is no appeal to the High Court from its decisions. On behalf of the council it is urged that no injustice has been done, but that is not the question. The point is whether "due inquiry" has been made. Where the legislature without specifically prescribing procedure, has entrusted any body with the duty of deciding something, the law implies the requirement that the substantial requirements of justice shall not be violated. The substantial requirements of justice were explained by Cotton and Bowen L.JJ. in *Leeson* v. *General Medical Council* (1), and they must be observed whether or no there has been a previous trial, for the legislature has not provided otherwise: see *Spackman* v. *Plumstead District Board of Works* (2) and *Local Government Board* v. *Arlidge* (3). Under s. 29 the council must itself hold the inquiry and judge whether or not the medical practitioner was guilty of the conduct alleged against him. When he disputes the charge or any material facts forming part of it, the council does not hold "due inquiry" merely by ascertaining that a court of law has made "due inquiry" and has come to a certain decision. Parliament has decided that the tribunal for adjudicating on these matters is to be one of doctors. There may be points on which a doctor would prefer the findings of members of his own profession rather than those of a legal tribunal. He is entitled to claim them as his judges rather than the judges of the Divorce Division. The council is perfectly well fitted to deal with an issue of adultery. In over ninety per cent. of the cases coming before it there has been no previous trial. It is constantly called on to determine questions of fact and does it very well. In this case, as in others, the inquiry and adjudication must be by the council acting in a judicial capacity, and the respondent was entitled to come before it and, notwithstanding the finding of the Divorce Court, to deny that he committed the adultery and submit evidence in support of his denial. In

(1) 43 Ch. D. 366, 377, 383.
(2) (1885) 10 App. Cas. 229.
(3) [1915] A. C. 120, 140.

such a case as the present the council may treat the finding of the Divorce Court and the evidence given at the trial as constituting a prima facie case against the medical practitioner, but, if he contests the charge, it is bound to hear the evidence which he tenders without limit so far as it is relevant. Only if he does not contest the charge may the finding of the court be sufficient material for the council's decision. The weight to be attached to the argument and evidence on behalf of the practitioner is entirely a matter for the council which is entitled to take into account all relevant circumstances. In the present case it gave its ruling without considering the merits of the proposed evidence. There is no complaint made of the standing orders of the council or of the rules made under them. If the procedure followed had complied with them, the witnesses would have been called and there would have been no ground of criticism: see r. 9 in sch. to c. XIV. of the standing orders. The practice adopted by the council was inconsistent with its own rules. The exclusion of the fresh evidence by the council can derive no support from the practice of the Court of Appeal, for this is not an appeal. It was bound to listen fairly to both sides and it did not do so. The respondent's success in this House would not limit the right of the council in this case to make "due inquiry" into his conduct hereafter.

Harman K.C. in reply. The real question is: Was justice done in this case? If so, there was "due inquiry." The respondent has argued that the requirements of justice are the same, whether or no there has been a previous inquiry, but that does not imply that there must be the same procedure. If persons have been heard before they need not always be heard again. The heavy burden already borne by the council should not be increased. There may be cases in which it would be impossible to procure the evidence available before the Divorce Court. On the construction of s. 29 of the Act, the legislature has shown clearly that it sees no injustice in ordering the council to rely implicitly on a conviction before a judge in a criminal matter. Construing the whole section together, when "due inquiry" is enjoined, the first part provides a guide to the meaning of the second.

The House took time for consideration.

Aug. 5. Viscount Simon L.C. My Lords, this appeal involves a question of importance as to the proper exercise of the statutory jurisdiction conferred on the General Medical Council to remove from the medical register a practitioner who is alleged to have been guilty of infamous conduct in a professional respect. Parliament has conferred on the General Medical Council responsibility for the register, and has constituted the council a domestic forum to determine whether a case is made out for striking off the list a particular name. The gravity to the doctor concerned of an adverse decision by the council needs no emphasis, but the responsibilities of the General Medical Council cannot be measured only by the effect of its decision on an individual. The high reputation of the medical profession as a whole depends in no small measure on excluding from it those whose professional misconduct makes them unworthy to belong to it, and the confidence which the public are accustomed to put in the family doctor is intimately connected with the assurance that those who practise the art of medicine are, in all relations with their patients, individuals of the highest honour.

It is convenient at this point to set out the terms of s. 29 of the Medical Act, 1858, on which the whole question turns. It runs as follows:—"If any registered medical practitioner "shall be convicted in England or Ireland of any felony or "misdemeanour, or in Scotland of any crime or offence, or "shall after due inquiry be judged by the General Council "to have been guilty of infamous conduct in any professional "respect, the General Council may, if they see fit, direct the "registrar to erase the name of such medical practitioner "from the register." Contrast may usefully be made between this section and the very different language of such a section as s. 1 of the Clergy Discipline Act, 1892.

The issue has been argued before us with ability and candour by both sides. It is not disputed that the General Medical Council, in exercising this jurisdiction, is not a judicial body in the ordinary sense. It is master of its own procedure and is not bound by strict rules of evidence. It is not subject to correction by the courts as long as it complies with s. 29 of the Act of 1858. That section draws a significant distinction between a case in which the impeached practitioner has been convicted of felony or misdemeanour and a case in which the allegation of infamous conduct is not connected with a criminal conviction. In the former case, the decision of the council is properly based on the fact of the conviction, and the practitioner cannot go behind it and endeavour to show that he was innocent of the charge and should have been acquitted. In the latter case, the decision of the council, if adverse to the practitioner, must be arrived at "after due inquiry," and this of course means after due inquiry by the council. The question, therefore, is whether the council in this case can be regarded as having reached its adverse decision "after due "inquiry" when it has refused to hear evidence tendered by the practitioner with a view to showing that he has not been guilty of the infamous conduct alleged and that the finding of the Divorce Court against him as co-respondent is wrong.

It is worth observing that this problem does not arise only in connexion with conclusions reached in the Divorce Court. A jury's verdict of justification in proceedings for slander, judgment for the plaintiff in an action for seduction, a bastardy order made by a bench of magistrates—all these, and many other, instances of adverse conclusions reached in a court of law might conceivably in certain circumstances lead to a charge against a medical man of infamous conduct in a professional respect. It seems obvious, in these other instances, that, while the council might well treat the conclusion reached in the courts as prima facie proof of the matter alleged, it must, when making "due inquiry" permit the doctor to challenge the correctness of the conclusion and to call evidence in support of his contention. The previous decision is not between the same parties. There is no question of estoppel or of res judicata. In such cases the decision of the courts may provide the council with adequate material for its own conclusion if the facts are not challenged before it, but, if they are, the council should hear the challenge and give such weight to it as the council thinks fit. The same view must, I think, be taken if the practitioner challenges the correctness of a finding of adultery by the Divorce Court. The decree provides a strong prima facie case which throws a heavy burden on him who seeks to deny the charge, but the charge is not irrebuttable. So much follows from the structure of s. 29 and from the necessity, if there is to be "due inquiry," of giving the accused party a fair opportunity of meeting the accusation. Unless Parliament otherwise enacts, the duty of considering the defence of a party accused, before pronouncing the accused to be rightly adjudged guilty, rests on any tribunal, whether strictly judicial or not, which is given the duty of investigating his behaviour and taking disciplinary action against him. The form in which this duty is discharged—

e.g. whether by hearing evidence viva voce or otherwise—is for the rules of the tribunal to decide. What matters is that the accused should not be condemned without being first given a fair chance of exculpation. This does not mean that the council has to rehear the whole case by endeavouring to get the previous witnesses to appear before it, though in special circumstances the recalling of a particular witness, in the light of what the accused or his witnesses assert, may, if feasible, be desirable. The council will primarily rely on the sworn evidence already given at the trial. It is not required to conduct itself as a court. Its members may usefully bear in mind the language of Lord Loreburn, L.C., in *Board of Education* v. *Rice* (1), where, dealing with the decision of an administrative body the Lord Chancellor said that "they "must act in good faith and fairly listen to both sides, for "that is the duty lying upon everyone who decides anything. "But I do not think they are bound to treat such a question "as though it were a trial. . . . They can obtain information "in any way they think best, always giving a fair opportunity "to those who are parties in the controversy for correcting "or contradicting any relevant statement prejudicial to their "view." The previous practice of the council recognizes that there are special cases in which a finding of adultery by the Divorce Court is not to be treated as final, for, if the further evidence tendered to the council had been evidence which could not with reasonable diligence have been put before the court, the council would have heard it. This qualification has been explained as being analogous to the exceptional cases in which the Court of Appeal admits further evidence, but there is really no analogy. The council is not a Court of Appeal, and the rule of the Court of Appeal is based on the view that the time to call evidence is on the occasion of the trial and that before the Court of Appeal it is normally too late to do so. Here the position is quite different. The conclusion of the Divorce Court constitutes, as I have already said, a strong prima facie case against the doctor, but, when this much is proved, the procedure prescribed by para. 9 (*b*) of the rules set out in the schedule to ch. XIV. of the standing orders of the council should be followed, namely: "The practitioner "will then be called on by the President to state his case, "*and to produce the evidence in support of it.*"

In weighing the value of rebutting evidence produced before

(1) [1911] A. C. 179, 182.

it, the council is entitled to bear in mind that it is not given on oath, although (in a case like the present) it might have been brought forward under oath at the trial, and that the council cannot compel the attendance of other witnesses which might refute it. The council is further entitled to attach to the conclusion of the Divorce Court all the weight that is due to the effect on a trained judicial specialist of sworn testimony given, subject to cross-examination, before a tribunal which can compel attendance of witnesses and production of documents, but all this does not exonerate the council from refusing to allow the accused to put before it relevant matter in support of his denial. If it was considered desirable to make the decision of the Divorce Court conclusive, and so to prevent the possibility of a second hearing on the issue of adultery, this could only be brought about by amending s. 29. I move the House that this appeal be dismissed, with costs.

LORD ATKIN (read by LORD ROMER). My Lords, I have had an opportunity of reading the opinion delivered by the Lord Chancellor and as I substantially agree I content myself with making a short addition. The conduct alleged against the respondent is conduct from which the public have every claim to be protected, and there would be none more ready to afford protection than the members of the medical profession itself, but it is obvious that the gravity of the charge does not diminish the weight of the evidence necessary to establish it. It increases it. The responsibility, therefore, thrown on the General Medical Council in such cases is grave. Now, it is plain that the statute throws on the council and on the council alone the duty of holding due inquiry and of judging guilt. They cannot, therefore, rely on inquiry by another tribunal or a judgment of guilt by another tribunal. The practitioner charged is entitled to a judgment the result of the considered deliberation of his fellow practitioners. They must, therefore, hear him and all relevant witnesses and other evidence that he may wish to adduce before them. It is not disputed that where there has been a trial, at least before a High Court judge, the notes of the evidence at such trial and the judgment of the judge may afford prima facie evidence in support of the charge, for the council are not obliged to hear evidence on oath, but the very conception of prima facie evidence involves the opportunity of controverting it, and

I entertain no doubt that the council are bound, if requested, to hear all the evidence that the practitioner charged brings before them to refute the prima facie case made from the previous trial. If this is inconvenient it cannot be helped. It is much more inconvenient that a medical practitioner should be judged guilty of an infamous offence by any other than the statutory body. Convenience and justice are often not on speaking terms. Nor do I accept the view put forward on behalf of the council that they are ill qualified to form an opinion on such a charge as the present compared with a High Court judge. I can imagine no tribunal better qualified to draw deductions from the proved conduct between a doctor and his female patient than the very experienced body of men for instance who sat on the present inquiry.

Some analogy exists, no doubt, between the various procedures of this and other not strictly judicial bodies, but I cannot think that the procedure which may be very just in deciding whether to close a school or an insanitary house is necessarily right in deciding a charge of infamous conduct against a professional man. I would, therefore, demur to any suggestion that the words of Lord Loreburn L.C. in *Board of Education* v. *Rice* (1) afford a complete guide to the General Medical Council in the exercise of their duties. As I have said, it is not correct that "they need not examine witnesses." They must examine witnesses if tendered, and their own rules rightly provide for this. Further it appears to me very doubtful whether it is true that "they have no power to "administer an oath." This proposition which is found in other cases, and in the judgments of the Court of Appeal in the present case appears to ignore the provisions of Lord Brougham's Evidence Act, 1851 (14 & 15 Vict. c. 91), s. 16.

The only other remark I would make is that it is reasonably plain that the council, in accordance with its practice which will now, of course, be changed, relied for its decision on the judgment of Langton J. and on nothing else. They appear only to have been provided with those extracts from the shorthand notes which are exhibited to the affidavit of the registrar in the present case, which do not contain any evidence at all of adultery, but do relate to the absence of doubt in the mind of the judge. The question, however, does not turn on the judge's absence of doubt, but on whether the members of the council are themselves convinced of their

(1) [1911] A. C. 179, 182.

fellow-practitioner's guilt. I agree with the judgment of Singleton J. and those of the lords justices, and am of opinion that the appeal should be dismissed.

Lord Russell of Killowen. My Lords, I have been asked by my noble and learned friend Lord Macmillan, who is unable to be present here to-day, to say that he agrees with the opinion which has been delivered by the Lord Chancellor.

Lord Wright (read by Lord Russell of Killowen). My Lords, I concur in the opinion which my noble and learned friend, the Lord Chancellor, has delivered. I also agree with the dissenting judgment of Singleton J. in the Divisional Court, the substantial effect of which was accepted by the Court of Appeal. I merely add a few observations of my own.

The appellant council is a statutory body and its functions are such as Parliament has conferred on it. The particular power and duty conferred which are relevant to this case are those contained in s. 29 of the Medical Act, 1858. This gives the council disciplinary powers over registered medical practitioners. It specifies two main conditions under either of which the powers of the council may be exercised. (1.) If the medical practitioner is convicted in England or Ireland of any felony or misdemeanour, or (2.) if he is after due inquiry judged by the council to have been guilty of infamous conduct in any professional respect. In either of these cases the council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register. If either condition is satisfied, the stated power may be exercised, but the exercise is discretionary. They may, "if they see fit."

The former condition is defined precisely and nothing more than the conviction is required to found the discretion, though how the discretion is to be exercised is left to the council. The other condition is on a different footing. There is no definition of what may constitute "infamous conduct in any "professional respect." The precise meaning and scope of these words are left to the council. It has to decide whether infamous conduct has been made out to its satisfaction. It has not merely to ascertain the facts, but also to decide what standard to apply and whether to hold that the particular conduct is infamous, not in the abstract but "in any pro-"fessional respect." There is no appeal from its decision. Such tremendous powers, which may close a man's professional

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career and ruin him financially and socially, have been vested in the council by Parliament from a faith both in the members' expertness in regard to that grave issue and in their moral gravity and trustworthiness. Such is the eminence of the council and so completely representative is it of a great profession, the honour and integrity of which are of the highest importance as matters of public policy. The council is not a court of law. No particular procedure is prescribed. It can determine its own procedure. It has not the usual powers of a court of law. It has no power to compel the attendance of witnesses or to take evidence on oath or to order discovery of documents or the production of documents. It is not bound by the laws of evidence. I have observed that Parliament has not provided for any appeal from the decisions of the council. The only control of the court to which the council is subject (apart from proceedings by way of mandamus) is the power which the court may exercise by way of certiorari. Certiorari is not an appellate power. Its use may nullify or discharge an order made by the council, but the grounds on which certiorari may be granted are strictly limited. They may, I think for purposes of this case, broadly be taken to be (1.) the ground that the council's proceeding was ultra vires, (2.) the ground which without any very great precision has been described as a departure from "natural justice." The former ground is not likely to be invoked in connexion with the orders of the council. Their powers are so wide and undefined that the possibility of a case of ultra vires is theoretical and almost fantastic. It is not to be contemplated that the council would proceed without solid prima facie grounds or otherwise than in good faith. The question of a failure of "natural justice" is what is to be considered in this appeal, but, before considering the meaning of these words, I must first observe that they can in this case be properly taken as a description of what the council has to do, namely, to make "due inquiry," which under the statute is the governing criterion, that is an independent inquiry by the council as the body responsible for its own decision.

"Natural justice" seems to be used in contrast with any formal or technical rule of law or procedure. Some light on what it connotes may be got from the authorities, to certain of which I now refer. Thus *Spackman* v. *Plumstead District Board of Works* (1) was a case of administrative decision in

(1) 10 App. Cas. 229.

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a matter of local government. Under the relevant Act an architect's certificate was made conclusive for fixing a general line for buildings. The Earl of Selborne L.C., made some general observations. He said that (1): "No doubt, in the "absence of special provisions as to how the person who is to "decide is to proceed, the law will imply no more than that "*the substantial requirements of justice* shall not be violated. "He is not a judge in the proper sense of the word; but he "must give the parties an opportunity of being heard before "him and stating their case and their view. He must give "notice when he will proceed with the matter and he must act "honestly and impartially and not under the dictation of "some other person or persons to whom the authority is not "given by law. There must be no malversation of any kind. "There would be no decision within the meaning of the statute "if there were anything of that sort done contrary to *the* "*essence of justice*." I have italicized the two phrases which the Earl of Selborne seems to me to use as meaning what is generally meant by "natural justice." He adds, that "this is "a matter not of a kind requiring form, not of a kind requiring "litigation at all, but requiring only that the parties should "have an opportunity of submitting to the person by whose "decision they are to be bound such considerations as in their "judgment ought to be brought before him." I may also quote briefly from two other decisions of this House which indicate what is the duty of what are called "administrative "tribunals," not, perhaps, very happily because the word "tribunal" suggests a court of law and a litigation, whereas what is meant may better be described as the duty of a body charged by statute with a duty of deciding. I quote first the language of Lord Loreburn L.C. in *Board of Education* v. *Rice* (2). He said: "Comparatively recent statutes have "extended, if they have not originated the practice of imposing "upon departments or officers of State the duty of deciding "or determining questions of various kinds. . . . . It will, "I suppose, usually be of an administrative kind; but some-"times it will involve matter of law as well as matter of fact, "or even depend upon matter of law alone. In such cases "the Board of Education will have to ascertain the law and "also to ascertain the facts. I need not add that in doing "either they must act in good faith and fairly listen to both "sides, for that is a duty lying upon everyone who decides

(1) 10 App. Cas. 229, 240.

(2) [1911] A. C. 179, 182.

"anything. But I do not think they are bound to treat such "a question as though it were a trial . . . . The board is in "the nature of the arbitral tribunal, and a court of law has no "jurisdiction to hear appeals from the determination either "upon law or upon fact. But if the court is satisfied either "that the board have not acted judicially in the way I have "described, or have not determined the question which they "are required by the Act to determine, then there is a remedy "by mandamus and certiorari." Lord Loreburn had just expressly observed that the board "can obtain information in "any way they think best, always giving a fair opportunity "to those who are parties to the controversy for correcting "or contradicting any relevant statement prejudicial to their "view." The words *fair* and *relevant* are to be noted. If this statement is applicable to an "administrative tribunal," it must, in my opinion, be applicable to the proceedings of the council which may not inaptly be described as a professional tribunal like so many other similar professional bodies which are invested by statute for grave reasons of public policy with disciplinary powers over members of the profession.

In *Local Government Board* v. *Arlidge* (1), the same general principles were applied and the language of Lord Loreburn in *Board of Education* v. *Rice* (2) was approved. The case raised the issue whether the respondent had had a fair hearing. In the public inquiry, which had been held in accordance with the statute, he and his witnesses had been heard orally, but after the inquiry the board's inspector submitted his report to the board who decided the matter after considering the facts and the evidence given at the inquiry and the inspector's report. The respondent claimed that he should have seen the report and been heard orally by the officer of the board who actually decided it. He had been offered the opportunity of submitting a written further statement, but had not availed himself of it. This House, reversing the majority of the Court of Appeal, Hamilton L.J. dissenting, held that Parliament must have intended that the ordinary procedure of the board, which was the deciding body, would be followed (as they held it had been), and that the work of decision had been done judicially and fairly in the sense indicated by Lord Loreburn. Viscount Haldane L.C., said (3) : "When the duty of deciding an appeal "is imposed, those whose duty it is to decide it must act

(1) [1915] A. C. 120.

(2) [1911] A. C. 179.

(3) [1915] A. C. 120, 132.

"judicially. They must deal with the question referred to "them without bias, and they must give to each of the parties "the opportunity of adequately presenting the case made. "The decision must be come to in the spirit and with the "sense of responsibility of a tribunal whose duty it is to mete "out justice. But it does not follow that the procedure of "every such tribunal must be the same."

The position of the council under s. 29 has been considered specifically in certain cases. In *Ex parte La Mert* (1), the applicant's name had been ereased from the medical register under s. 29. He applied for a rule nisi calling on the council to show cause why a mandamus should not issue commanding them to restore his name to the register. He had published a book which the council held to be indecent and improper. This they had decided to be infamous conduct in a professional respect. The court refused the rule. Cockburn C.J. said (2) that the legislature, considering the council to be the best judges in such a matter, had left the matter in their arbitrament and the court could not interfere. The question was whether the council were entitled to rule that, though they would hear the doctor by himself or his solicitor, they would not hear counsel. Blackburn J. observed (2) that the council had not refused to hear what the applicant had to say. In *Leeson* v. *General Medical Council* (3), the decision of the council was attacked on the ground of bias. The medical practitioner had been held guilty of infamous conduct within s. 29 because he had allowed himself to be cover to an unqualified person as if he were duly practising under the Act. The complaint of bias was grounded on the fact that of the twenty-nine persons who had held the inquiry, two were members of a body called the Medical Defence Union, one of the objects of which was to prosecute and suppress unauthorized practitioners. The proceedings had been instituted by the union, but these two members were not of its managing body. The court refused to interfere. It held (Fry L.J. dissenting) that the two members had not such an interest in the matter in question as to disqualify them from acting. I ought, at least, to quote what was said by Bowen L.J. in *Leeson's case* (4). The language of the statute, he said, "certainly imports that the "substantial elements of natural justice must be found to "have been present at the inquiry. There must be due

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(1) (1863) 4 B. & S. 582.
(2) Ibid. 584.
(3) 43 Ch. D. 366.
(4) Ibid. 383, 384.

"inquiry. The accused person must have notice of what he is "accused. He must have an opportunity of being heard, and "the decision must be honestly arrived at after he has had a "full opportunity of being heard. With respect to the charge "made, the charge of which he has notice, it is a charge of "infamous conduct in some professional respect, and the "particulars which should be brought to his attention in order "to enable him to meet that charge ought to be particulars of "conduct which, if established, is capable of being viewed by "honest persons as conduct which is infamous. That is all. "We have seen that these conditions have been fulfilled by the "inquiry and by the tribunal which institutes it. The functions "of the court of law are at an end." Cotton L.J. expressed the same views and Fry L.J. said nothing to the contrary, though he dissented in the result because he thought that membership of the union constituted a bias which disqualified the members from sitting on the inquiry. In *Allinson* v. *General Medical Council* (1), the Court of Appeal composed of Lord Esher M.R., and Lopes and Davey L.JJ., agreed with the view of the majority in *Leeson's* case (2).

In *Rex* v. *Local Government Board. Ex parte Arlidge* (3) Hamilton L.J. described the phrase "contrary to natural "justice" as an expression "sadly lacking in precision." So it may be, and, perhaps, it is not desirable to attempt to force it into any procrustean bed, but the statements which I have quoted may, at least, be taken to emphasize the essential requirements that the tribunal should be impartial and that the medical practitioner who is impugned should be given a full and fair opportunity of being heard. These are conditions of the validity of any decision enunciated by the council. A very strong instance of the effect of bias is afforded by *Dimes* v. *Proprietors of Grand Junction Canal Co.* (4). A decree of Lord Cottenham L.C., was there set aside because he had an interest in the company, unknown to the defendant. It was immaterial that, as Lord Campbell said (5), "no one can suppose that "Lord Cottenham could be, in the remotest degree, influenced "by the interest that he had in this concern." If the principles of natural justice are violated in respect of any decision, it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential

(1) [1894] 1 Q. B. 750.
(2) 43 Ch. D. 366, 383, 384.
(3) [1914] 1 K. B. 160, 199.
(4) (1852) 3 H. L. C. 758.
(5) Ibid. 793.

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principles of justice. The decision must be declared to be no decision.

Thus, in my opinion, in the present case the council has to take the inquiry up afresh. There is, in my opinion, no force in certain objections which have been raised. The council very properly have treated the decree of the Divorce judge as prima facie evidence. So it is, and very strong evidence too, especially considering that the respondent did not appeal but paid the 1000*l.* of damages awarded against him. That, however, is no reason for refusing him the full and fair opportunity of stating his case before the council. The legislature has not made a decree of the Divorce Court conclusive on the question of adulterous conduct in the same way as it has made a conviction of felony or misdemeanour conclusive so that in such a case all that the council has to decide on proof of the decree and the identity of the party is whether the adultery amounts to infamous conduct in a professional respect. Parliament, when it thinks fit, can clearly and effectively put on the same footing for the purpose of disqualifying the offender as a conviction of treason and felony a decree of adultery of the Divorce Court. This it has done in the Clergy Discipline Act, 1892, s. 1. In s. 29 Parliament has not done so, but has put convictions for felony and misdemeanour in a special category by themselves. In other cases than these the offences charged must be proved independently by some evidence which the council can accept. Thus, the decree is prima facie, but no more than prima facie evidence, and the doctor proceeded against must be entitled to call evidence, either his own or that of other witnesses, to controvert the charge. Mr. Hempson, who appeared as the respondent's solicitor, asked for leave to call certain witnesses who were available, as he admitted, at the time of the trial in the Divorce Court but were not called, though in his view they should have been called, on the respondent's behalf. It is unfortunate that the council did not consider this application on its merits, but met it with a blank refusal on the ground of the council's practice not to allow fresh evidence to be called if it might have been called in the trial court which, as here, was the Divorce Court. This practice was, however, a departure from the practice adopted in the council's rules scheduled to c. XIV. of the standing orders. Rule 9, paras. (*a*) and (*b*), provide that, if there is no complainant (as in the present case), the council's solicitor will state the facts and produce the evidence so far as the case is not admitted, and "the practitioner will then be called upon by the president "to state his case, and to produce the evidence in support "of it. He may address the council either before or at the "conclusion of his evidence, but only once." These rules I apprehend were merely domestic rules which the council adopted and could change, but the relevant rule, as it stood, satisfied, as I think, the essential requirements of justice and fair play. I do not know how it came to be changed and the present practice substituted. That practice is said to be based on the analogy of what is stated to be the practice of the Court of Appeal in admitting or rejecting fresh evidence. However that may be, I do not think there is any analogy at all between the proceedings of the council and those in the Court of Appeal. The latter is a rehearing of the case presented in the court below, and in the interest of the maxim "ut sit finis litium" the Court of Appeal has a discretion about admitting fresh evidence. The position of the council is entirely different. They are an independent body. They are not a Court of Appeal. The practitioner appears before them for the first time. The proceedings in the Divorce Court were an entirely separate proceeding. The proceedings before the Council are fresh proceedings, before a different body who are bound to hold a due inquiry on their own responsibility and make their own decision on the evidence before them. It is, indeed, to be regretted that the council should have, for some reason and at some time, departed from their former sound rule.

I am unable to see the force of the objection urged against hearing the evidence that the council is not a court of law or equipped with the machinery for ascertaining facts. Parliament has put the duty of inquiry on them and they seem to have discharged their duty for the last eighty odd years. Most of the cases before the council must involve questions of fact which they have to decide as best they can. It can only be in comparatively rare cases that the cause of complaint is a matter which has been decided in a court of law other than by a conviction for felony or misdemeanour. The decision of the court should, indeed, ease that duty, because the proceedings and judgment of the court at least give the council prima facie evidence which may be for practical purposes unanswerable by the practitioner, but he must surely be entitled to deny the charge before the council and bring his evidence if he contests the justness of the decision of the court. If the decision of the court is to be made conclusive, the law must be changed by Parliament. In my opinion, the decision which has been brought up to the court on certiorari ought not to stand. The council ought to take up the inquiry again. I do not seek in any way to suggest or forecast how they will hold it. The discretion and responsibility for the procedure are theirs. I would dismiss the appeal.

LORD ROMER. My Lords, I have had the privilege of reading and considering beforehand the opinion delivered by the Lord Chancellor, and I concur in it in its entirety.

Appeal dismissed.

Solicitors for appellant: *Waterhouse & Co.*
Solicitors for respondent: *Hempsons.*

END OF VOL. AND OF APPELLATE SERIES FOR 1943.

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